88-711

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

UNITED TRANSPORTATION UNION AND
BURLINGTON NORTHERN RAILROAD COMPANY
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

The court below held that the Interstate Commerce Act (ICA), and more specifically the labor dispute resolution mechanisms prescribed by that act and set forth in Interstate Commerce Commission (ICC or Commission) decisions thereunder, supersede the concomitant provisions of the Railway Labor Act for resolving labor disputes arising out of Commission authorized rail line sale transactions. The majority, however, over the vigorous dissent of one member of the panel, also held that the Norris-LaGuardia Act prohibited enjoining a threatened strike aimed at blocking the Commission authorized transactions until negotiations under the RLA had been concluded in a manner satisfactory to respondent UTU. The question presented is:

Whether the majority of the panel of the Court below erred in concluding that the NLGA prevents enjoining a strike aimed at avoiding the ICA's dispute resolution procedures and frustrating an order of the Commission authorizing transfer of a line of railroad pursuant to 49 USC 10901.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were Petitioner, the Interstate Commerce Commission, and the Respondents, Burlington Northern Railroad Company and United Transportation Union

and the Railway Labor Executives Association.

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UNITED TRANSPORTATION UNION AND
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RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Interstate Commerce Commission ("Commission") respectfully prays for a writ of certiorari to review the decision and order of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on May 31, 1988 and September 16, 1988.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Eighth Circuit are reprinted in the Appendix hereto at App. B and App. C.[1] The opinion is reported at 848 F.2d 856 (8th Cir. 1988). The order is unreported. The decision of the Interstate Commerce Commission in Ex Parte No. 392 (Sub-No. 1) *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901,* is reprinted in the Appendix at

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[1] Each item in Petitioner's Appendix ("APP") is individually lettered, pages within are then numbered.

App. E and is reported at 1 I.C.C.2d 810 (1985), *aff'd mem. sub nom. Illinois Commerce Commission v. I.C.C.*, 817 F.2d 145 (D.C. Cir. 1987). The Commission decision denying petitions for revocation of the exemption and authorizing transfer of the line involved from Burlington Northern (BN) to Montana Rail Link (MPL), ICC Finance Docket No. 31089 is reprinted in Appendix D.

JURISDICTION

The Commission was granted leave to intervene by order of the circuit court. The judgment of the circuit court was entered May 31, 1988. Petitions for Rehearing and Suggestion for Rehearing *En Banc* with respect to the issue of the relation of the Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*, ("ICA") to the Norris-LaGuardia Act, 29 U.S.C. 101 *et seq.* ("NLGA") by BN and the Commission were denied in an order issued September 16, 1988. (App. B).[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act, 49 U.S.C. (Supp. V). 10101a, 10505 and 10901, are set forth in App. A. This appeal also involves Section 4 of the Norris-LaGuardia Act, 29 U.S.C. 104. That statutory provision is also reprinted in the Appendix hereto in App. A.

STATEMENT OF THE CASE

(1) Under Section 10901 of the Interstate Commerce Act (ICA), a non-carrier can acquire and operate a

[2] An amended order was filed September 23, 1988 this order is also reprinted in Appendix B.

railroad line "only if the Commission finds that the public convenience and necessity require or permit" that it be done. 49 U.S.C. 10901(a). If the Commission finds that the acquisition is within the public interest, it may approve the acquisition with such conditions, including labor protective conditions, as the Commission "finds necessary in the public interest. . . ."[3] 49 U.S.C. 10901(c)(1)(A)(ii).

Under Section 10505 of the ICA, the Commission has the power to exempt rail transportation from the requirements of the Act. Indeed, the Commission "shall exempt" rail transportation "when the Commission finds that the application of a provision of this subtitle. . . is not necessary to carry out the transportation policy of Section 10101a." 49 U.S.C. 10505(a)(1). However, this exemption may be revoked by the Commission to the extent the Commission finds "is necessary to carry out the transportation policy of Section 10101a." 49 U.S.C. 10505(d). The Commission retains its regulatory jurisdiction over the exempt transaction.[4] The Commission may not exercise its authority to relieve a carrier of its obligation to protect the interests of employees. 49 U.S.C. 10505(g).

Following the partial deregulation of the railroad industry by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1941-45, a significant change took place in the railroad industry with the creation of numerous

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[3] See, *e.g.*, *ICC v. Railway Labor Executives' Ass'n*, 315 U.S. 373 (1942); *CMC Real Estate Corp. v. ICC*, 807 F.2d 1025 (D.C. Cir. 1986).

[4] See, *e.g.*, *UTU v. Norfolk & Western R. Co.*, 822 F.2d 1114 (D.C. Cir. 1987) *cert. denied*, 108 S.Ct. 700 (1988); *G&T Terminal Packaging v. Consolidated Railroad Corp.* 830 F.2d 1230, 1234-1235 (3d Cir. 1987) *cert. denied*, 108 S.Ct. 1291 (1988).

short lines and regional railroads through the sale of marginal rail lines formerly operated by established Class I railroads to new entrepreneurs.[5] Previously, marginal lines had been abandoned and taken out of service. This healthy trend was assisted by a change in Commission policy. Starting in 1982, the Commission determined that the expense of satisfying labor protective conditions suitable for major rail consolidations or even upon abandonment of a line if imposed on the sale or transfer of rail lines to new carriers under Section 10901 would hamper shortline development and force upon carriers the less attractive to the public interest alternative of abandoning those lines under Section 10903 of the ICA.

As the imposition of labor protection in short line sales to new entrants is within Commission discretion, the Commission began withholding protection in individual applications.[6] After consideration of many individual applications, the Commission determined that formation of new rail carriers was beneficial and should be encouraged. Therefore, the Commission promulgated the procedures in Ex Parte 392 (Sub-No. 1), *Class*

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[5] See, Finance Docket No. 31205, *FRVR Corporation-Exemption Acquisition and Operation-Certain Lines of Chicago & North Western Transportation Co. Petition for Clarification* (not printed), served January 29, 1988 ("*FRVR*"). Attached as Appendix F.

[6] See, *Knox and Kane Railroad Co.-Gettysburg Railroad-Petition for Exemption,* 366 I.C.C. 439 (1982). The Commission theory on withholding protection was grounded on the premises of (1) the preservation of rail service, (2) continued service offers the best opportunity for employment for labor, and (3) this process is less cumbersome than abandonment under Section 10903 and sale under Section 10905, use of which achieves the same result as Section 10901.

Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985) *aff'd sub nom Illinois Commerce Commission v. ICC,* 817 F.2d 145 (D.C. Cir. 1987) (*mem.*). ("*Class Exemption*") (App. F). There, the Commission exempted rail line sales to new carriers from full compliance with Commission application procedures while retaining authority, under the revocation power, to review and correct any problem arising from the transaction.[7]

The *Class Exemption* established a simplified scheme by which a carrier could apply for an exemption which would be granted seven days after filing unless the Commission notified the parties to the contrary. Any opposition to the exemption may be presented in a petition to revoke the exemption in whole or in part which may be filed with the Commission at any time. The Commission evaluates the petition and may grant whatever remedy it deems appropriate to correct any problem arising out of the transaction. As here pertinent, the Commission's panoply of remedies ranges from partial revocation and imposition of labor protective conditions to the termination of the entire exemption. The Commission order disposing of such a petition is reviewable in the Courts of Appeals. 28 U.S.C. 2342.

The Commission's *Class Exemption* procedures and the underlying policy have been successful. New rail-

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[7] As all courts which have addressed the issue have acknowledged, the ICC's *Class Exemption* is consistent with the policies expressed by Congress in the Staggers Act amendment to the ICA, *Illinois Commerce Commission, supra*; see also *RLEA v. Pittsburgh & Lake Erie R.R. Co.*, 845 F.2d 420, (3d Cir. 1988). The Staggers Act expanded the Commission's exemption authority. Further, the Congress directed the Commission to actively pursue exemptions for transportation operations and to review carrier actions after the fact to correct abuses.

road formation has risen each year since 1982 and the miles of lines abandoned by carriers has fallen each year since 1982[8] until April of 1988 when the whole program was brought to a stand still by the second of two decisions by the United States Court of Appeals for the Third Circuit holding that RLA procedures apply to branch line sales undertaken pursuant to the Commission's *Class Exemption* authorization. The court issued a status quo injunction preventing consummation of the Commission authorized transaction at issue for those proceedings until RLA procedures for resolution of major disputes had been complied with. Since that time there have been no new railroad formations of any significance and the rate of abandonment of lines has accelerated.[9]

The Commission has petitioned for a writ of certiorari to review the latter decision in No. 88-217; P&LE has sought to bring both decisions of the Third Circuit before this Court by petitions in No. 87-1888 and No. 87-1589.

In formulating the *Class Exemption,* the Commission addressed in detail RLEA's demand that labor protection be imposed on all 10901 transactions. A petition by RLEA among others to review the *Class Exemption* decision on this issue was denied. See *Illinois Commerce Commission v. ICC,* 817 F.2d 145 (D.C. Cir. 1987) (*mem.*)

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[8] See, *FRVR, supra* at App. F.

[9] On an annualized basis the number of entrants seeking exemptions under the *Class Exemption* has decreased by approximately 50% from 1987 to 1988. The mileage requested to be transferred under the *Class Exemption* has decreased by 85%. On the other hand, the number of miles sought to be abandoned increased for the first year since 1982 from 1,932 in FY 1987 (October 1, 1986-Sept. 30, 1987) to 2,996 in FY 1988.

(2) This case arose when BN, in reliance upon the *Class Exemption* procedures, announced its intention to sell a portion of its lines to MRL. In July 1987, the Commission, pursuant to a notice of exemption filed by MRL, authorized the transfer of the BN properties.[10] The transaction was consummated on October 31, 1987. In response to the exemption the United Transportation Union (UTU) failed an action in the United States District Court for the District of Montana seeking to enjoin the transfer of the properties on the ground that the RLA required BN to bargain with its employees prior to consummating the transaction. Union motions for a preliminary injunction were denied.[11]

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[10] UTU petitions to stay and revoke the exemption were denied by the Commission in *Montana Rail Link–Exemption Acquisition & Operation–Certain Lines of Burlington Northern Railroad,* F.D. No. 31089 (served May 26, 1988). This decision (attached as Appendix D) was based on an extensive record at the Commission, including a three day public hearing. UTU has not sought judicial review of that decision.

[11] The lawsuit was styled as: *United Transportation Union, et al. v. Burlington Northern Railroad Company,* 672 F. Supp. 1579 (D. Mont. 1987), and the court denied the motion on the ground that ICC approval of the MRL exemption petition exempted the transaction from the effects of any other federal law, including the Railway Labor Act, citing the Second Circuit's opinion in *Railway Labor Executives' Association v. Staten Island Railroad Corp.,* 792 F.2d 7 (2d Cir. 1986), *cert. denied,* 107 S.Ct. 927 (1987). The unions filed a notice of appeal from this decision with the U.S. Court of Appeals for the Ninth Circuit. Two other actions requesting injunctions against the sale were also filed. *Citizens to Save the Southline v. Montana Rail Link,* No. 87-74-H-CCL (D. Mont. filed, Aug. 6, 1987); *Citizens Alliance to Save the Southline v. ICC,* No. 87-7465 (9th Cir., filed Oct. 17, 1987). Both courts denied the requested injunctions. Finally, a BN employee filed suit alleging that the sale was a fraudulent conveyance under Montana law thus challenging the Commission's jurisdiction and class exemption procedures.

(footnote continued on next page)

After the district court denied the union motion to enjoin the transfer, UTU threatened to strike the BN on the date set for the transfer of the properties (October 31, 1987). On that day BN obtained a temporary restraining order (TRO) prohibiting the strike. *Burlington Northern Railroad Co. v. UTU,* No. 86-5013-CV-SW-8, slip op. (W.D. Mo. Nov. 16, 1987). The district court also denied BN's motion for a preliminary injunction against the strike but did continue the injunction against the strike pending appeal on the grounds that "substantial and difficult issues were presented and that the balance of equities favored BN's request for an injunction." The Eighth Circuit Court of Appeals denied a UTU motion to suspend the injunction pending appeal and directed BN to avoid further layoffs until the court decided the matter. Thus, the two actions before the Eighth Circuit concerned (1) BN's appeal from the denial of its motion for a preliminary injunction against the strike and (2) UTU's appeal from the district court's issuance of the injunction pending appeal.

On May 31, 1988 a panel of the Eighth Circuit Court of Appeals issued its decision in the case. Styled as *BN v. UTU,* 848 F.2d 856 (8th Cir. 1988) the majority decision, authored by Judge Heaney, held that the ICA superseded the RLA so the Commission could "supervise and implement labor protective conditions in terms of acquisitions, sales, and abandonments of railroad lines." In these circumstances the court held "the ICA supersedes the . . . RLA which provides an essentially duplicative or overlapping process designed to reach

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Holmes, et al. v. BN, U.S.D.C., (D. Montana); No. CV-87-250-GF-PGN. Defendant BN's motion to dismiss is pending before the court.

labor protective agreements. Were it otherwise, the ICC's authority in this area, and specifically its recent deregulatory actions, would be largely nullified." (App. C-26a).

The majority of the panel however, did not uphold a comparable supersedence by the ICA of the NLGA or find a need to accommodate NLGA to the ICA. *Id.*[12] In the circumstance of a 10901 transaction, the panel held that there was no "direct incompatibility" between the ICA and NLGA. Given this lack of incompatibility and absent an express statutory provision such as 49 U.S.C. 11341, the panel held itself powerless to enjoin a strike intended to compel negotiations under the RLA. (App. C-26a).

One member of the *BN* panel dissented on the NLGA issue. In that judge's view injunctive relief must be available to protect an ICC order from disruption by a union strike that challenges the terms of that order and in fact works an "unacceptable neutralization" of the congressional policy in favor of the Commission's exercise of its authority. (App. C-34a).

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[12] The Eighth Circuit that day also issued a decision in a companion case. That case, *Railway Labor Executives' Association v. Chicago & North Western Transportation Company, et al.*, 848 F.2d 102 (8th Cir. 1988), is itself the subject of a petition for a writ of certiorari; *RLEA v. Chicago & North Western Transportation Company and Dakota, Minnesota & Eastern Railroad*, No. 87-2049, June 14, 1988, (*DM&E*) and arises out of an agreement between C&NW and DM&E for the former to sell and the latter to buy 966 miles of rail lines, branch lines and trackage rights pursuant to the *Class Exemption* procedures.

As the Commission pointed out in its Memorandum to the Court in *Pittsburgh & Lake Erie Railroad Company v. RLEA*, No. 87-1888, June 14, 1988, *DM&E* and *BN* are two of a number of cases in which rail labor has sought to invoke provisions of the RLA and NLGA to enjoin or frustrate the transfer of rail lines to new entrants so as to force bargaining under RLA procedures.

BN and the Commission filed with the circuit court on June 14, 1988, a petition for rehearing on the issue of the relationship between NLGA and the ICA and for rehearing *En Banc.* Specifically, the petition raised the issue of whether NLGA prevents the courts from enjoining strikes called to block the transfer of rail property authorized by Commission order pursuant to the *Class Exemption.* After calling for a response by UTU, the court, by a vote of 5 to 4, denied the petition in an order filed September 16, 1988. The Commission, therefore, petitions this Court for a writ of certiorari to review this critical issue of the Commission's authority over the sale or transfer of rail lines under 49 U.S.C. 10901.

PRELIMINARY STATEMENT OF COMMISSION AUTHORITY

The Commission believes that its authority to intervene in the court proceedings below and its status as a proper party before this Court may be raised as an issue. Should it be, the Commission respectfully directs the Court's attention to its preliminary statement in the Commission's petition for a writ of certiorari and the reply to opposition filed thereto in *ICC v. Pittsburgh and Lake Erie R.R. Co.,* No. 88-217 (August 5, 1988).

REASONS FOR GRANTING THE WRIT

As the Commission explained in its memorandum (filed June 14, 1988) urging deferral of the decision on whether to grant certiorari in petitions Nos. 87-1589 and 87-1888 and its petition for writ of certiorari in No. 88-217 and reply to the opposition filed thereto this petition presents the best vehicle for resolving the regulatory and labor relations issues presented by this

and the several other petitions brought before the Court during its last term and over the summer recess.[13] Prompt and proper resolution of these issues is critical to the continuing modernization and revitalization of the railroad industry and the Commission's ability to fulfill the role assigned to it by Congress in superintending that process.

(1) The panel below properly found unanimously that the ICA and Commission ordered labor dispute resolution procedures supersede the RLA. However, by declining to afford injunctive relief against a strike designed to negate the effectiveness of the Commission's authorization until an agreement satisfactory to rail labor has been reached pursuant to the major dispute resolution processes of the RLA, the majority of the panel of the court below emasculated that finding and has condoned a result at odds with prior decisions of this Court on the issue of the exclusive and plenary nature of the Commission's jurisdiction over consolidations, sales and other dispositions of rail assets.

In *Transit Commission v. United States,* 289 U.S. 121 (1933) this Court found that Section 1(18) of the ICA required Commission approval of any extension of an interstate carrier's rail line. Section 1(18) was later recodified and line sales and extensions are now regulated under Section 10901, the section at issue here.

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[13] The petitions presenting similar issues before the Court include: *RLEA v. Chicago & North Western Transportation Company, et al.,* No. 87-2049, filed June 14, 1988; *Pittsburgh & Lake Erie Railroad Company v. RLEA,* No. 87-1888, filed May 17, 1988; *RLEA v. Pittsburgh & Lake Erie Railroad Company,* No. 87-1589, filed March 24, 1988; *RLEA v. Guilford Transportation Industries, Inc.,* No. 87-1911, filed May 24, 1988; *Interstate Commerce Commission v. P&LE,* No. 88-217, filed August 5, 1988.

Permanent cessations of service which were also regulated under Section 1(18) are presently regulated under Section 10903. With respect to permanent cessations of service this Court has found that the Commission's exclusive jurisdiction preempted other laws that acted as obstacles to the Commission's authority despite the absence of an express statutory preemption provision. *Chicago & North Western Transportation Co. v. Kalo Brick and Tile Co.*, 450 U.S. 311 (1981) (*Kalo Brick*). As this Court recognized in *Kalo Brick* this authority is granted to the Commission by Congress as a part of a regulatory framework to ensure a rail transportation system in the public interest. *Id.* at 320. Finally, in *Schwabacker v. United States*, 334 U.S. 182 (1984), this Court held that the Commission's authority over mergers of rail carriers is exclusive and plenary.

The Commission's authority, of necessity, extends to oversight of labor management relations to the extent necessary to ensure that realization of the public benefits associated with the transaction authorized by the Commission as consistent with the public interest are not frustrated. In *United States v. Lowden*, 308 U.S. 225 (1939), this Court approved the Commission's authority to impose on rail transactions conditions designed to resolve labor disputes arising out of the transaction over the objection of rail management and prior to that authority having been explicitly granted the Commission. In *ICC v. Railway Labor Executives' Association*, 315 U.S. 373 (1942), this Court also upheld the Commission's authority to impose labor conditions on abandonments. Finally, in a concurring opinion authored by Mr. Justice Stevens, and joined by Justices Brennan, Marshall and Blackmun, *Brotherhood of Locomotive Engineers v. ICC*, ____ U.S. ____, 107 S.Ct.

2360 (1987); it was agreed that Commission authorization of a consolidation pursuant to 49 U.S.C. 11343 is effective against any and all other statutes that would serve as an impediment to its implementation including RLA and NLGA.

Thus the decision of the majority of the panel below, by giving rail labor an RLA based veto over Commission authorized transactions, conflicts with decisions of this Court upholding the Commission's exclusive and plenary authority over consolidations, sales and other dispositions of rail assets in the rail industry and establishing the Commission's authority and obligation to resolve labor management disputes arising out of Commission authorization of such transactions. (See *Norfolk & Western Ry. Co. v. Nemitz,* 404 U.S. 37 (1971)).

(2) The decision of the majority of the panel below is also contrary to a previous Eighth Circuit decision which confirmed the propriety of an injunction to protect the Commission's exclusive and plenary authority over a transfer of rail properties even in the face of an NLGA challenge by the unions. In *Missouri Pacific Railroad Co. v. United Transportation Union,* 782 F.2d 107 (8th Cir. 1986) *cert. denied,* 107 S.Ct. 3209 (1987) (*MOPAC*), the Eighth Circuit held that NLGA does not prevent the issuance of an injunction in support of the Commission's power to resolve labor disputes arising out of Commission authorized consolidation and trackage rights proceedings. In so holding the appellate court agreed with the district court that:

> allowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the Commission. 782 F.2d at 112.

In the decision below the Eight Circuit has given UTU the very power previously refused it, the power to force

negotiation over a term of a transaction withdrawn from negotiation by the Commission in authorizing the transaction or to frustrate a transfer of rail property the Commission found to be in the public interest (App. C-33a.). In doing so, the majority of the panel declined to afford protection to ICA dispute resolution procedures which it previously found had displaced the comparable RLA procedures.

(3) The majority's holding is logically flawed because its dual holdings regarding the RLA, NLGA and the ICA are incompatible. The panel majority first determined that RLA procedures are not applicable to *Class Exemption* transactions because they are displaced by ICA dispute resolution procedures. However, the majority next held that the railroad can be subjected to a strike if it does not bargain with rail labor under those same RLA procedures. This Court has held that RLA dispute resolution procedures are entitled to protection even to the extent of enjoining a strike, the NLGA notwithstanding. *Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R.*, 353 U.S. 30 (1957), *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970). The *Class Exemption* procedures also channel labor disputes into specific and exclusive procedures designed to resolve the dispute. The majority of the panel below erred by failing to recognize that ICA dispute resolution procedures which they found had displaced RLA dispute resolution procedures were equally worthy of protection notwithstanding the NLGA.

(4) The decision of the majority of the panel below is also incorrect because it is bottomed upon an illusory distinction between the Commission's discretion to impose labor protections in some classes of transactions and its mandate to do so in other classes of trans-

actions.[14] The majority below held that when labor protective conditions are discretionary, the ICA cannot displace the NLGA's anti injunction provisions but the ICA does displace the NLGA where the Commission must impose labor conditions on a rail transaction and does so. (App. C-29(a). This view is illogical. The presence or absence of mandatory labor protection can have no bearing on the authority of the Commission to resolve labor disputes arising out of it authorization of a transaction. To accept the majority's formulation of the Commission's jurisdiction reduces that jurisdiction to an outcome determinative test. If the Commission imposes labor protection it has exclusive and plenary jurisdiction over the transaction; if it does not impose protection it does not have such jurisdiction. In addition, this view leads inevitably to the conclusion that the Commission has no authority over labor issues arising out of any rail transaction in which labor protections are, in rail labor's sole judgment, not sufficient.

(5) The Court should confirm the fact that a Commission order permitting the transfer of rail property is not meaningless when opposed by rail labor. The Eighth Circuit's decision as well as *P&LE I, supra,* confer upon rail labor a right to strike in protest of either the sale of lines undertaken pursuant to the *Class Exemption* procedures or the conditions to the sale approved by the Commission.

The crux of this decision and respondent UTU's position is that whenever rail labor is displeased with the Commission's approval of a *Class Exemption* transaction the union may ignore the Commission order and direct its ire (i.e. a strike) at the railroad for the purpose

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[14] For example, labor protections are mandatory in rail transactions approved pursuant to 49 U.S.C. 11343.

of (1) extracting from the railroad conditions the Commission has held not to be in the public interest or (2) frustrating the transaction entirely.[15]

In his dissent Judge Fagg noted the absurdity of this result by quoting with approval the court in *MoPac*:

> Allowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest. * * * [I]t is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired. (App. C-33a-34a).

Judge Fagg also stated:

> It is apparent a UTU strike here would be aimed at obtaining the essential equivalent of the same labor protective conditions UTU is actively seeking from the ICC. I am persuaded that in these circumstances, just as in cases in which protective conditions are mandatory, the NLGA cannot be used to thwart an ICC order approving the BN-MRL transaction. (App. C-34a).

(6) If the court of appeals decision is allowed to stand it will prevent the transfer of many lines to new en-

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[15] This strategy is also a collateral attack on the agency's order. An attack proscribed by this Court. *Venner v. Michigan Central R.R. Co.*, 271 U.S. 127 (1925); *RLEA v. Staten Island Railroad Corp.*, 792 F.2d 7 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 927 (1987). Accord, *United States Transportation Union v. Norfolk and Western Railway Co.*, 822 F.2d 1114 (D.C. Cir. 1987).

trants in the industry and the revitalization of regional rail service essential to the country. In fact, as noted in our petition for writ of certiorari in *ICC v. Pittsburgh & Lake Erie Railroad Company,* No. 88-217, the decisions of the United States Court of Appeals for the Third Circuit sustaining rail labor's positions on these same issues, (*RLEA v. Pittsburgh & Lake Erie R.R. Co.*, 831 F.2d 1231 (3d Cir. 1987), petition for certiorari pending, No. 87-1589 ("*P&LE I*") and *RLEA v. Pittsburgh & Lake Erie R.R. Co.*, 845 F.2d 420 (3d Cir. 1988), petitions for certiorari pending Nos. 87-1888 and 88-217 ("*P&LE II*") have ended all but the smallest of such transfers and also ended the revitalization process.[16] It is imperative that the Court resolve this controversy as quickly as possible so that the rebuilding of the country's regional rail services may continue.

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[16] See, *Stopped in their Tracks,* Forbes Magazine, May 30, 1988, p. 11.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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OCTOBER 28, 1988

APPENDIX

APPENDIX A

Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*

Section 10505, 49 U.S.C. § 10505

§ 10505. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle –

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from

an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continued intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1361; Pub.L. 96-488, Title II, § 213, Oct. 14, 1980, 94 Stat. 1912.

Section 10901, 49 U.S.C. § 10901

§ 10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may–

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Commission shall–

(1) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of the railroad line;

(2) send an accurate and understandable summary of the application to a newspaper of general circulation in each area that would be affected by the construction or operation of the railroad line;

(3) have a copy of the summary published in the Federal Register;

(4) take other reasonable and effective steps to publicize the application; and

(5) indicate in each transmission and publication that each interested person is entitled to recommend to the Commission that it approve, deny, or take other action concerning the application.

(c)(1) If the Commission–

(A) finds public convenience and necessity, it may–

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions the Commission finds necessary in the public interest; or

(B) fails to find public convenience and necessity, it may deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the construction or acquisition (or both) and operation approved by the Commission.

(d)(1) Where a rail carrier has been issued a certificate of public convenience and necessity by the Commission authorizing the construction or extension of a railroad line, no other rail carrier may block such construction or extension by refusing to permit the carrier to cross its property if (A) the construction does not unreasonably interfere with the operation of the crossed line, (B) the operation does not materially interfere with the operation of the crossed line, and (C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the carriers are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Commission for determination.

(e) The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1402; Pub.L. 96-448, Title II, § 221, Oct. 14, 1980, 94 Stat. 1928.

Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*

Section 4, 29 U.S.C. § 104

§ 104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.

Interstate Commerce Commission Regulations, Part 1150– Certificate to Construct, Acquire, or Operate Railroad Lines,

Subpart D–Exempt Transactions, 49 C.F.R. 1150

Subpart D–Exempt Transactions

SOURCE: 51 FR 2504, Jan. 17, 1986, unless otherwise noted.

§ 1150.31 Scope of exemption

(a) Except as indicated below, this exemption applies to all acquisitions and operations under section 10901 (*See* 1150.1, *supra*). This exemption also includes:

(1) Acquisitions by a noncarrier of rail property that would be operated by a third party;

(2) Operation by a new carrier of rail property acquired by a third party;

(3) A change in operators on the line; and

(4) Acquisition of incidental trackage rights. Incidental trackage rights include the grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party that occur at the time of the exempt acquisition or operation. This exemption does not apply when a class I railroad abandons a line and another class I railroad then acquires the line in a proposal that would result in a major market extension as defined at § 1180.3(c).

(b) Other exemptions that may be relevant to a proposal under this subpart are the exemption for control at § 1180.2(d)(1) and (2), and the from securities regulation at 49 CFR Part 1175.

§ 1150.32 Procedures and relevant dates.

(a) To qualify for this exemption, applicant must file a verified notice providing details about the transaction, and a brief caption summary, conforming to the format in § 1150.34, for publication in the FEDERAL REGISTER.

(b) The exemption will be effective 7 days after the notice is filed. The Commission, through the Director of the Office of Proceedings, will publish a notice in the FEDERAL REGISTER within 30 days of the filing. A change in operators would follow the provisions at § 1150.34, and notice must be given to shippers.

(c) If the notice contains false or misleading information, the exemption is void *ab initio.* A petition to revoke under 49 U.S.C. 10505(d) does not automatically stay the exemption.

§ 1150.33 Information to be contained in notice.

(a) The full name and address of the applicant;

(b) The name, address, and telephone number of the representative of the applicant who should receive correspondence;

(c) A statement that an agreement has been reached or details about when an agreement will be reached;

(d) The operator of the property;

(e) A brief summary of the proposed transaction, including:

(1) The name and address of the railroad transferring the subject property,

(2) The proposed time schedule for consummation of the transaction,

(3) The mile-posts of the subject property, including any branch lines, and

(4) The total route miles being acquired;

(f) A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States; and

(g) A certificate that applicant has complied with the notice requirements of § 1105.11.

[51 FR 2504, Jan. 17, 1986, as amended at 51 FR 25207, July 11, 1986]

§ 1150.34 Caption summary.

The caption summary must be in the following form. The information symbolized by numbers is identified in the key below:

INTERSTATE COMMERCE COMMISSION

Notice of Exemption

Finance Docket No.

(1)–Exemption (2)-(3)

(1) Has filed a notice of exemption to (2)(3)'s line between (4). Comments must be filed with the Commission and served on (5).(6).

Key to symbols:

(1) Name of entity acquiring or operating the line, or both.

(2) The type of transaction, *e.g.*, to acquire, operate, or both.

(3) The transferor.

(4) Describe the line.

(5) Petitioners representative, address, and telephone number.

(6) Cross reference to other class exemptions being used.

The notice is filed under § 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2581WM

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLEE

vs.

UNITED TRANSPORTATION UNION, APPELLANT

No. 87-2600WM

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLANT

vs.

UNITED TRANSPORTATION UNION, APPELLEE

Appeals from the United States District Court for the Western District of Missouri

---

Petition for rehearing en banc of Burlington Northern Railroad Company has been considered by the Court and is denied.

Judges John R. Gibson, Pasco Bowman, Roger L. Wollman and C. Arlen Beam voted to grant.

Petition for rehearing by the panel is also denied.

September 16, 1988

Order entered at the Direction of the Court:

/s/ ROBERT D. ST. VRAIN

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2581WM

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLEE

vs.

UNITED TRANSPORTATION UNION, APPELLANT

No. 87-2600WM

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLANT

vs.

UNITED TRANSPORTATION UNION, APPELLEE

Appeals from the United States District Court for the Western District of Missouri

---

AMENDED ORDER

Petition for rehearing en banc of Burlington Northern Railroad Company has been considered by the Court and is denied.

Judges John R. Gibson, Pasco Bowman, Roger L. Wollman and C. Arlen Beam voted to grant. Judge Frank Magill did not participate.

Petition for rehearing by the panel is also denied.

September 23, 1988

Order entered at the Direction of the Court:

/s/ ROBERT D. ST. VRAIN

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2581

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLEE

v.

UNITED TRANSPORTATION UNION, APPELLANT

FRED A. HARDIN, J.W. REYNOLDS, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, J. F. SYTSMA AND W. C. WALPERT

RAILWAY LABOR EXECUTIVES' ASSOCIATION

v.

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLEE

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, UNITED TRANSPORTATION UNION, APPELLANT

No. 87-2600

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLANT

v.

UNITED TRANSPORTATION UNION, APPELLEE

FRED A. HARDIN, J.W. REYNOLDS, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, J. F. SYTSMA AND W. C. WALPERT

RAILWAY LABOR EXECUTIVES' ASSOCIATION

v.

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLANT

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, UNITED TRANSPORTATION UNION, APPELLEE

Appeal from the United States District Court for the Western District of Missouri

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Submitted: December 15, 1987
Filed: May 31, 1988

Before HEANEY, ARNOLD and FAGG, Circuit Judges

HEANEY, Circuit Judge.

I. *Overview*

Burlington Northern Railroad Company (BN) announced its intention to sell a section of its rail lines to the Montana Rail Link (MRL), a newly formed corporation. This type of transaction was recently exempted from Interstate Commerce Commission (ICC) approval requirements, which generally involved the imposition of labor protective conditions. *See Ex Parte No. 392 (Sub. No. 1), Class Exemption for the Acquisition and*

Operation of Rail Lines under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1986), *review denied sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (*Ex Parte No. 392*). After unsuccessfully attempting both to engage BN in negotiations over the effects of the sale on BN employees and later to enjoin the sale, the United Transportation Union (UTU) threatened to strike. BN sought a preliminary injunction against the strike. The district court denied BN's request, finding the Norris-LaGuardia Act, 29 U.S.C. §§ 110-115 (Norris-LaGuardia) prohibited such relief. It did, however, grant an injunction pending review by our Court. On appeal, BN claims that Norris-LaGuardia must be accommodated to the action of the ICC in *Ex Parte No. 392,* and thus cannot bar an injunction. Alternatively, it argues that the Railway Labor Act, 45 U.S.C. § 151-188 (RLA), prohibits the strike because the UTU has not exhausted major dispute procedures under that Act.

We affirm the decision of the district court insofar as it held that Norris-LaGuardia prevents the issuance of an injunction here, and we dissolve the injunction issued by the district court pending this appeal. Second, we find the RLA's major dispute procedures are, in this instance, superseded by the terms of the Interstate Commerce Act, 49 U.S.C. § 10101-11917 (ICA), and thus cannot bar the strike.

II. *Factual Background*

In July, 1987, BN announced its intention to lease approximately 830 miles of its trackage to MRL, a newly formed corporation. These rail lines extend from Huntley, Montana, to Sand Point, Idaho. BN also proposed to sell various branch lines, equipment, personal property,

and facilities to MRL. In the past, this transaction would have been contingent upon the approval of the ICC, and labor protective conditions would normally have been imposed for the protection of BN employees. However, recently, such sales have been exempted from ICC approval procedures. *See Ex Parte No. 392*, 1 I.C.C.2d 810 (1986).

In compliance with *Ex Part No. 392*, MRL filed a petition for exemption. Under the terms of *Ex Parte No. 392*, such exemptions are automatically granted seven days after they are filed. *See* 49 C.F.R. § 1150.32(b). Several parties requested a stay of the exemption. The ICC, however, denied those requests and the exemption issued on July 31, 1987. Finance Docket No. 31087, decided July 31, 1987, *Montana Rail Link, Inc.–Exemption Acquisition and Operation–Certain Lines of the Burlington Northern Rail Company.* Subsequently, a number of the unions representing BN employees, including the UTU, filed petitions to revoke the exemption. These petitions requested labor protection for BN employees affected by BN's action. The ICC has not yet ruled on these petitions. The transaction was closed on October 31, 1987, after the ICC made a specific finding that it was "in the public interest' and after the unions unsuccessfully sought an injunction against the transaction in the United States District Court for the District of Montana. *United Transp. Union v. Burlington Northern R.R.*, 672 F. Supp. 1579 (D. Mont. 1987).

Before the Montana district court, the unions sought to enjoin the sale and maintain the status quo until the arbitration and mediation provisions of the RLA were exhausted. The district court refused to grant this request. Relying on *Railway Labor Executives' Ass'n v. Staten Island R.R.*, 792 F.2d 7 (2d Cir. 1986,), *cert.*

denied, ____ U.S. ____, 107 S.Ct. 927 (1987), it found that the mandatory bargaining procedures of the RLA would frustrate the action of the ICC and thus did not provide the court with authority to issue an injunction. 672 F. Supp. at 1582. However, the court, citing *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3d Cir. 1987). did note that there was no inherent incompatibility between the ICC's action and the provisions of Norris-LaGuardia, thus suggesting that Norris-LaGuardia would bar an effort to enjoin a subsequent strike by the unions. 672 F. Supp. at 1582-83 n. 4. The UTU has appealed this decision to the Ninth Circuit.

After the Montana district court denied the unions' motion to enjoin the sale, the UTU threatened a nationwide strike against BN. BN immediately sought a temporary restraining order and a preliminary injunction from Judge Joseph E. Stevens of the United States District Court for the Western District of Missouri. *See Burlington Northern R.R. v. United Transp. Union*, No. 86-5013-CV-SW-8, slip op. (W.D. Mo. Nov. 16, 1987). The court granted the temporary restraining order but subsequently denied the request for a preliminary injunction. In declining to issue a preliminary injunction, Judge Stevens placed primary reliance on *Pittsburgh and Lake Erie*, 831 F.2d 1231. A few hours later, the court granted BN's motion for an injunction pending appeal. We denied UTU's motion to suspend the injunction pending appeal and directed BN to avoid further layoffs until we had decided the matter.

On appeal, BN contends that the ICA vests the ICC with exclusive and plenary jurisdiction to resolve disputed issues. Thus, they argue, Norris-LaGuardia

does not bar an injunction against the proposed strike. Second, BN maintains the RLA prohibits the strike since UTU has not exhausted major dispute procedures.

III. *The ICA, the RLA and Norris-LaGuardia*

A. Statutory Framework

1. The Interstate Commerce Act (ICA)

The ICA is fundamentally a statute designed to regulate commerce. Its goal is to make commerce flow smoothly to the benefit of both American industry and consumers. The Act seeks to ensure fair shipping rates, safety and efficiency in transportation, and to preserve the viability of various modes of transportation. The ICA also seeks to discourage harmful monopolistic practices, detrimental state regulation, and labor strife – all of which tend to impede commerce to the detriment of industry and consumers. *See* 49 U.S.C. §§ 10101, 10101a.

The ICA generally requires that before a railroad acquires an additional line or abandons a line, the rail carriers involved in the transaction must obtain the approval of the ICC. 49 U.S.C. §§ 10901, 10903. Pursuant to the ICA's goal of preventing labor strife by "encourag[ing] fair wages and safe and suitable working conditions in the railroad industry," *see* 49 U.S.C. § 10101a(12), approval by the ICC has in the past generally required the imposition of plans to compensate workers displaced by the particular transaction. These plans are called labor protective conditions or labor protective agreements. Under its authority, the ICC has developed standard labor protective conditions for particular types of transactions.[1]

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[1] When the transaction involves the sale of a rail line, the ICC imposes its *New York Dock* conditions upon the parties. *See New*

In the early 1970's the railroad industry, for a variety of reasons, began to experience economic difficulty. In 1976, concern about the "financial health" of this industry prompted Congress to pass the Railroad Revitalization and Regulatory Reform (4-R) Act, Pub. L. No. 94-210, 90 Stat. 31 (1976). The 4-R Act empowered the ICC, *inter alia*, to exempt individual transactions or classes of transactions from the Act's prior approval requirements (and thus avoid the cost of labor protective conditions). Pub. L. No. 94-210, 90 Stat. at 42.

Four years later, in another deregulatory effect, Congress passed the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). In the Staggers Act, Congress attempted to "reduce regulatory barriers to entry into and exit from the [railroad] industry." *Id.* § 101(a), 94 Stat. 1897, codified at 49 U.S.C. § 10101a. Specifically, the Act broadened the exemption provisions codified at 49 U.S.C. § 10505, to provide that exemptions "shall" be granted to carry out the Staggers Act national rail policy. 94 Stat. at 1913.

In 1986, the ICC, in an ex parte rule-making procedure, exercised its new section 10505 power to exempt, as a class, line sales to "new carriers"[2] from the detailed approval procedures required under section 10901. *See Ex Parte No. 392*, 1 I.C.C.2d 810 (1986). To facilitate these sales, the ICC further prescribed an expedited approval procedure in place of the procedure that would otherwise apply under section 10901(b).

York Dock Ry.–Control–Brooklyn E.D. Terminal, 360 I.C.C. 60 (1979), *aff'd*, 609 F.2d 83 (2d Cir. 1979). If it is a case of abandonment, it imposes *Oregon Short Line III* conditions. *See Oregon Short Line R.R.–Abandonment*, 360 I.C.C. 91 (1979).

[2] "New carrier" means a newly formed railroad not already subject to the ICA.

Under the class exemption, sales to new carriers are authorized to go forward seven days after the parties file verified notices with the ICC. *Id.* at 820, *see also* 49 C.F.R. § 1150.32(b).

The ICC's action in *Ex Parte No. 392* was appealed to the United States Court of Appeals for the District of Columbia Circuit. That court denied review of the ICC's action without an opinion. *Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).

2. The Railway Labor Act (RLA)

The RLA regulates the relationship between railroads and their employees. The purposes of the Act include avoiding interruption to commerce, ensuring worker freedom of association and the right to unionize, providing for the "prompt and orderly" settlement of employment related disputes, and securing the "complete independence" of railroads and their employees in matters of self-organization and in carrying out the Act's other purposes. *See* 45 U.S.C. § 151a.

Under the RLA, controversies over proposed changes in collective bargaining agreements are termed "major" disputes (to be distinguished from "minor" disputes over the "interpretation or application"of existing agreements and practices). *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723-24 (1945). Under §§ 2 Seventh and 6 of the Act, a party desiring to change a working condition embodied in an existing agreement, or to bring a condition not previously covered within an agreement, must serve a "§ 6 notice" upon the opposing party. 45 U.S.C. §§ 152 Seventh, 156. The resulting major dispute is subject to dispute resolution including conferences, mediation, and, in some cases, proceedings before a presidential emergency board. 45 U.S.C.

§§ 155, 156, 160. Until these procedures are exhausted, neither party may change the status quo, i.e., the "actual objective working conditions" in existence at the beginning of the dispute. *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149, 153 (1969).[3]

3. The Norris-LaGuardia Act

The Norris-LaGuardia Act withdraws jurisdiction from the federal courts in cases growing out of labor disputes. The Act clearly states:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as the terms are herein defined) from • • •
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment.

29 U.S.C. § 104.

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[3] The Act lacks any mechanism to compel agreement in major disputes. Binding arbitration of a major dispute is available only if both parties agree to it. *See* 45 U.S.C. §§ 155, 157; *Elgin J. & E. Ry.*, 325 U.S. at 725.

Section 3 of the RLA commits minor disputes over the "interpretation or application" of existing agreements and practices to the exclusive jurisdiction of Adjustment Boards, i.e., to "compulsory arbitration." *Brotherhood of R.R. Trainmen v. Chicago R. & I. R. R.*, 353 U.S. 30, 39 (1957); 45 U.S.C. § 153 First (i); *see Elgin J. & E. Ry.*, 325 U.S. at 724. If the resolution of a labor dispute arguably depends upon the interpretation or application of a collective bargaining agreement or established past practice, the dispute must go to an Adjustment Board, not to a court. *Brotherhood of Maintenance of Way Employes v. Burlington Northern Ry.*, 802 F.2d 1016, 1022, (8th Cir. 1986). While the controversy is pending before the Board, the carrier is free to apply its interpretation of the disputed agreement or past practices. *Id.*

The public policy behind Norris-LaGuardia is clearly stated in the Act. Specifically, the Congress found that prevailing socio-political and economic conditions prevented individual workers from obtaining "acceptable terms and conditions of employment." Therefore, Norris-LaGuardia sought to ensure workers the right to organize and conduct union activities "free from the interference, restraint, or coercion" of employers or their agents by means of labor injunctions. *See* 29 U.S.C. § 102.

B. Analysis

As noted above, the ICA is fundamentally a commerce statute directed toward ensuring the free flow of commerce. The RLA is a labor statute that orders the relationship between railroads and their employees. Norris-LaGuardia is a jurisdictional labor statute designed to deal with historical anti-union animus in the federal courts by withdrawing jurisdiction in cases growing out of labor disputes. Each of these congressional enactments are intended to be preeminent in terms of the subject matter they regulate. However, toward the periphery of the authority granted under each law, there exist overlapping powers and responsibilities which must be accommodated and harmonized.

For example, when the imperatives of labor statutes such as the RLA and Norris-LaGuardia conflict, the federal courts have determined that if the provisions of the RLA represent some "overriding, equally clear yet irreconcilable labor policy" which would be frustrated by the literal enforcement of Norris-LaGuardia's anti-injunction provisions, the latter act can be accommodated. *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231, (citing *Chicago &*

North Western Ry. v. United Transp. Union, 402 U.S. 570 (1971); *Boys Market, Inc. v. Retail Clerk's Union Local 770*, 398 U.S. 235 (1970); *Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R.*, 373 U.S. 33 (1963); *Brotherhood of R.R. Trainmen v. Chicago & Indiana R.R.*, 353 U.S. 30 (1957); *Brotherhood of Ry. Trainmen v. Howard*, 343 U.S. 768 (1952)).

Yet, the problem of harmonizing labor statutes with statutes in other fields – particularly those which encourage commerce and industrial expansion – presents far more difficult balancing problems. In this age of trade unions with nationwide membership, it is increasingly difficult to remember that without the clear protections erected by the Congress in Norris-LaGuardia, the RLA, and the National Labor Relations Act, 29 U.S.C. §§ 151-187, the right to organize, the right to bargain collectively, and the right to strike in the United States were simply untenable propositions.

The preamble to Norris-LaGuardia recognized this problem in stark terms. The statute withdrew jurisdiction from the federal courts to enjoin labor disputes in the realization that:

> under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, *the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment* * * *.

29 U.S.C. § 102 (emphasis added).

Moreover, the Supreme Court has recently recognized the fundamental importance of Norris-LaGuardia in

terms of the viability of the labor movement:

> The Norris-LaGuardia Act . . . expresses a basic policy against the injunction of activities of labor unions.
> * * *
> The congressional debates over the Norris-LaGuardia Act disclose that the Act's sponsors were convinced that the extraordinary step of divesting federal courts of equitable jurisdiction was necessary to remedy an extraordinary problem.
> * * *
> The Norris-LaGuardia Act responded directly to the * * * pattern of injunctions entered by federal judges. "The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction."

Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees, 481 U.S. ____, 107 S.Ct. 1841, 1846-47 (1987) (citations omitted).

Finally, experience shows that as the protections of labor statutes are diluted, even under the "neutral" terms of deregulatory actions by Congress, the economic power of employees is visibly diminished by both contracting the authority of their representatives to bargain on their behalf and by reducing the ranks of their organized membership.

With this in mind, we turn to the task of exploring the interplay between the ICA, the RLA, and Norris-LaGuardia.

Under the ICA, Congress sought to provide the ICC with the means to prevent labor strife by assuring "fair wages and working conditions in the railroad industry." 49 U.S.C. § 10101a(12). To accomplish this important *but limited aim*, Congress provided the ICC superseding authority to supervise and implement labor protective conditions in terms of acquisitions, sales, and abandonments of railroad lines. But it did so only insofar as this authority is necessary to "assure fair wages and working conditions" in order to ensure the free flow of commerce. In these narrow circumstances, the ICA supersedes the authority of the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping process designed to reach labor protective agreements. Were it otherwise, the ICC's authority in this area, and specifically its recent deregulatory actions, would be largely nullified. However, the ICA does not so easily supersede Norris-LaGuardia for, except where Congress has *specifically exempted the ICA from the operation of other laws and required mandatory labor protective conditions*, nowhere in the ICA is there any indication of its direct incompatibility with the anti-injunction statute. Clearly, Norris-LaGuardia says nothing about the methods by which labor protective agreements are made, but rather represents a completely independent *and very clear* decision by Congress to insulate labor disputes from the injunctive powers of the federal courts.

Our decision in *Missouri Pacific Ry. v. United Transp. Union*, 782 F.2d 107 (8th Cir. 1986) (per curiam), *cert. denied*, ___ U.S. ___, 107 S.Ct. 3209 (1987), when read in conjunction with *Railway Labor Executives' Ass'n v. Staten Island R.R.*, 792 F.2d 7 and *Railway Labor Executives' Ass'n v. Pittsburgh & Lake*

Erie R.R., 831 F.2d 1231 illustrates implicitly the interaction of these three federal statutes.

In *Missouri Pacific*, we held that when a consolidation transaction subject to 49 U.S.C. §§ 11341, 11347, statutory provisions which specifically *exempt carriers from all other law*[5] and *require mandatory employee protective conditions*[6], neither the RLA nor Norris-LaGuardia could operate to restrict the terms of the ICA. In the *Staten Island* case, the Second Circuit found, in a transaction governed by 49 U.S.C. § 10905 (similar to the transaction here in controversy), there was jurisdiction under the RLA in terms of the bargaining relationship between the railroads and the unions. However, the court found that the ICA's action approving the transaction withdrew from the courts the power under the RLA to "formulate a meaningful remedy without impinging on the ICC's order approving the sale

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[5] 49 U.S.C. § 11341(a) provides:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. * * * A carrier, corporation, or person participating in [an] approved or exempted transaction is exempt from all other law, including State and municipal law, as necessary to let that person carry out the transaction. * * *

"[T]his subchapter" refers to Subchapter III of Chapter 113 of the ICA, §§ 11341-51, under which the transaction in *Missouri Pacific* was approved, and not 49 U.S.C. § 10901, Subchapter I of Chapter 109 of the Act, applicable here.

[6] 49 U.S.C. § 11347 provides:

> When a carrier is involved in a transaction for which approval is sought under [the consolidation provisions] of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement * * * protective of the interest of employees who are affected by the transaction * * *.

in question."[7] 792 F.2d at 12, *see also United Transp. Union v. Burlington Northern R.R.*, 672 F. Supp. 1579, 1582-83. They thus dismissed the case under Fed. R. Civ. P. 12(b)(6).[8]

Finally, in the *Pittsburgh & Lake Erie* case, the Third Circuit, with a transaction identical to the one before us, faced a request by an employer railroad to accommodate Norris-LaGuardia to the ICA. The court refused to do so, recognizing both the overriding importance of Norris-LaGuardia and finding no irreconcilability between the ICC's authority over the bargaining process and Norris-LaGuardia's prohibition against injunctions. Specifically, the court stated:

> [None of the provisions] relied on by P & LE which makes the ICC's authority "exclusive" with respect to combinations of carriers, contains any language which would suggest Congress intended to override the anti-injunction policy of section 4 of the Norris-LaGuardia Act by the Interstate Commerce Act. * * * Neither the ICC nor P & LE have pointed to any language in the legislative history of any of the labor laws or the Interstate Commerce Act which suggests that the strong national policy embodied in the Norris-LaGuardia Act is to be subordinated to the ICC's authority to approve an acquisition of railroad property.

831 F.2d at 1235-36.

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[7] In *Staten Island*, the viability of Norris-LaGuardia in terms of the ICA was not at issue.

[8] In *Railway Labor Executives' Ass'n* v. *Pittsburgh & Lake Erie R.R.*, No. 87-3797, slip op. (3d Cir. April 8, 1988), the Third Circuit in a carefully crafted opinon by Judge Becker, recently found that the ICC's action in Ex Parte No. 392 did not preempt the RLA.

Thus, the interplay of these three statutes can be summed up as follows. When the ICA provides a specific exemption from all other law and mandates inescapable employee protective conditions under provisions such as 49 U.S.C. §§ 11341(a), 11347, it effectively supersedes both the RLA and Norris-LaGuardia. If there is no exemption and specific protection is not mandated, the authority of the ICA only extends to the bargaining process concerning wages and working conditions. In these circumstances, while the bargaining provisions of the RLA are superseded, Norris-LaGuardia is unaffected and remains to protect the employees' interests.[9]

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[9] In *United Transp. Union v. Burlington Northern R.R.*, 672 F. Supp. 1579, the United States District Court for the District of Montana came to exactly this conclusion. This court, like ours, relying on *Staten Island*, found that mandatory bargaining provisions of the RLA were superseded by the terms of the ICA. However, the court, citing *Pittsburgh & Lake Erie*, found that the ICC's action did not affect the viability of Norris-LaGuardia. Specifically, the court stated:

> Both parties have brought to the attention of the court an opinion handed down by the Third Circuit on October 26, 1987, where the court reversed a district court decision enjoining a labor strike. The Third Circuit found that Section 4 of Norris-LaGuardia need not be accommodated to the Interstate Commerce Act. *Railway Labor Executives' Association v. Pittsburgh & Lake Erie R.R. Co.*, 831 F.2d 1231 (3d Cir. 1987).
>
> The case involved facts very similar to those in the instant case. The Railroad was selling its rail lines to a new non-carrier entity which filed for, and received, an exemption pursuant to section 10505 of the ICA. The union filed section 6 notices pursuant to the RLA and the railroad refused to negotiate. However, there the union chose to strike. Section 4 of the Norris-LaGuardia Act forbids federal district court injunctions against labor strikes. 29 U.S.C. § 104.
>
> *A strike by union members against their employer does not directly contradict or encroach upon the authority of the ICC.*

Moreover, this notion of the viability of Norris-LaGuardia in the face of the supersedure of the RLA is clearly in line with what Congress intended. In examining the impetus behind the recent deregulatory efforts in the railroad industry, Congress has sought to free the union-management relationship from time-consuming, "process oriented" bureaucracy imposed by various regulatory statutes and to allow the sagacious invisible hand of the free market economy to reorder rapidly that industry's economic difficulties. Thus, while we agree with BN's contention that enforcing the mandatory bargaining provisions of the RLA might render the changes in the ICA without much practical force, we find, like the Third Circuit, no inherent incompatibility between these actions and Norris-LaGuardia. Clearly implicit in the congressional vision of a vigorous free market is the realization that all major participants in the economy must be left free to exercise their economic strength and thus return the economy to its natural order. We thus find it impossible to believe that Congress would leave the railroads free to exercise their economic power to advance their goals, yet forbid the unions to use their strength to protect the interests of their membership.

In the end, should Congress wish to accommodate Norris-LaGuardia to the ICC in this situation, it can do

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The authorization of the sale still stands, and at the same time the employees have the right to pressure the employer to negotiate labor protections. The case is distinguishable in that an injunction of the sale would itself directly contradict and infringe upon the authority of the ICC. Congress has given full authority over sales and acquisitions of railroads to the ICC pursuant to the ICA.

672 F. Supp. at 1582-82 n. 3 (emphasis added).

so explicitly. Such a decision concerning such a significant change in federal labor policy is too important to be found implicitly by a court in the interstices of a federal statutory scheme.

IV. *Conclusion*

In its decision in *Ex Parte No. 392,* the ICC has acted, within its authority by exempting, as a class, sales to new carriers from the requirement of imposing labor protective conditions. Moreover, the ICC's authority to supervise and implement labor protective conditions in terms of sales, acquisitions, and abandonments by railway carriers insofar as this authority is necessary to "assure fair wages and working conditions" supersedes the authority of the mandatory bargaining provisions of the RLA. We thus dismiss BN's claim under the RLA.[10] However, we find no inherent incompatibility between the recent deregulatory efforts of the Congress and the ICC and the continued viability of Norris-LaGuardia in the circumstances presented here. We thus affirm the decision of the district court declining to issue an injunction against the proposed strike by the UTU and dis-

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[10] We would alternatively dismiss BN's claim under the RLA on the merits. BN maintains that a strike by the UTU should be enjoined because the UTU did not invoke the major dispute resolution procedures of the RLA and thus must exhaust their remedies before they can strike. The UTU did, however, attempt to do so by serving a Section 6 notice, but was frustrated in this effort by an arbitration award holding that, under the applicable collective bargaining agreements, the Union had no right to serve such a notice before April 1, 1988. We believe the operative fact here is that BN itself changed the status quo without serving a Section 6 notice and would thus be barred from seeking injunctive relief by its own omission.

solve the temporary injunction put in place pending this appeal.

FAGG, Circuit Judge, dissenting.

The district court denied BN's motion for a preliminary injunction against UTU's threatened strike, disclaiming jurisdiction to enjoin the strike on account of the Norris-LaGuardia Act (NLGA). *See* 29 U.S.C. § 104. I do not share the district court's view that injunctive relief is unavailable to protect an ICA order from disruption by a union strike that in essence challenges the terms of that order.

The court correctly observes that when the NLGA and the ICA overlap, they "must be accommodated and harmonized." *Ante* at 10. This accommodation is necessary because neither statute "may meaningfully be read in isolation * * * for they are in fact, an integrated plan of railroad regulation. And if, as is frequently the case in such undertakings, there be overlappings, '[w]e must determine * * * how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.'" *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 352 (1960) (quoting *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 806 (1945)) (Whittaker, J., dissenting).

There is no dispute the ICC has discretionary authority to impose labor protective conditions in this type of transaction. *See* 49 U.S.C. § 10901(c)(1)(A)(ii); *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231, 1235 (3d Cir. 1987); *Winter v. ICC*, 828 F.2d 1320, 1323 (8th Cir. 1987). It is also clear the ICC has the power to grant or deny UTU's pending request

for those conditions, *ante* at 4, and UTU will have access to judicial review of an adverse decision, *see* 28 U.S.C. § 2321(a). Simply stated, Congress has charged the ICC with the responsibility to impose protective labor conditions that are "necessary in the public interest" in section 10901 transactions. 49 U.S.C. § 10901(c)(1)(A)(ii).

The court holds, however, that when labor protective conditions are discretionary rather than mandatory, the ICA cannot displace the NLGA's antiinjunction provisions because that situation presents no "direct incompatibility" between the NLGA and the ICA. *Ante* at 13. I believe the court and the Third Circuit have drawn an illusory distinction between mandatory and discretionary conditions. *See Railway Labor Executives' Ass'n*, 831 F.2d at 1334-37. This approach to the issue has led the court mistakenly to conclude the district court was correct in deciding it was without jurisdiction to enjoin the UTU strike, and it is at this point that I respectfully part company with the court.

What is really involved in this case is this: whether UTU, displeased with ICC approval of BN's sale of a section of its rail lines to MRL, may bypass the ICC and direct its displeasure at BN for the singular purpose of extracting concessions that are at odds with the terms of the ICC order. I think not, and I believe my view is at the heart of the decision in *Missouri Pacific Railroad v. United Transportation Union*, 782 F.2d 107 (8th Cir. 1986) (per curiam), *cert. denied*, 107 S. Ct. 3209 (1987) (*MoPac*). In adopting the district court's decision permitting the injunction, the court in *MoPac* stated:

> [A]llowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend

> that affected employees have such power to block consolidations which are in the public interest. * * * [I]t is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired.

Id. at 112.

It is apparent a UTU strike here would be aimed at obtaining the essential equivalent of the same labor protective conditions UTU is actively seeking from the ICC. I am persuaded that in these circumstances, just as in cases in which protective conditions are mandatory, the NLGA cannot be used to thwart an ICC order approving the BN-MRL transaction. When viewed from this perspective the potential conflict, while undoubtedly relating to BN' relationship with its employees, does not bear the characteristics of an NLGA section 104 labor dispute. I believe Congress, through the ICA, has granted the ICC authority (subject to judicial review) to resolve conclusively the issues UTU seeks to raise by way of the threatened strike.

In sum, the UTU strike threat amounts to an unacceptable neutralization of congressional policy in favor of the ICC's exercise of expert authority to serve the public interest in the area of railroad service. I believe the provisions of the ICA embody the greater interest when a dispute involving a railroad and its employees has been triggered by an order of the ICC. In these circumstances, the competing aspects of the ICA and the NLGA should have been resolved by the district court in favor of the ICA. Thus, I would reverse the district

court's order disclaiming jurisdiction to consider BN's injunction request.

A true copy.

Atttest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX D

INTERSTATE COMMERCE COMMISSION DECISION

Finance Docket No. 31089

MONTANA RAIL LINK, INC. – EXEMPTION ACQUISITION AND OPERATION – CERTAIN LINES OF BURLINGTON NORTHERN RAILROAD COMPANY

Decided: May 6, 1988
[Service Date: May 26, 1988]

On July 24, 1987, Montana Rail Link, Inc. (MRL) filed a notice of exemption, under 49 CFR 1150.31 to acquire and operate certain properties of Burlington Northern Railroad Company (BN). The exemption became effective on July 31, 1987. The transaction was consummated on October 31, 1987.

We have received numerous comments and letters concerning the transaction. In addition, we received petitions under 49 U.S.C. 10505(d) to revoke the exemption from the following parties: (1) Citizens Alliance to Save the Southline (CATSS) and Railway Labor Executives' Association (RLEA) (jointly);[1] (2) Transportation Communication Union, Lodge No. 43 (TCU); (3) Billings Grain Terminal, Inc. (BGT); (4) Montana Attorney General Mike Greely (Attorney General); (5) Montana Department of Public Service Regulation, Montana Public Service Commission (MPSC); (6) Mon-

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[1] CATSS/RLEA also submitted 30 affidavits in support of their petition.

tana Congressman Pat Williams; and (7) Montana Senator Max Baucus.[2] MRL and BN have replied.[3] We have considered the extensive record developed in this proceeding, including these petitions and comments, the testimony from the oral hearing, the sales and related agreements for the acquisition and operation of these lines, and the evidence generated through discovery. We conclude that regulation of this transaction is not necessary to carry out the national rail transportation policy. We will therefore deny the revocation petitions.

BACKGROUND

On July 24, 1987, MRL filed a notice of exemption to acquire and operate BN properties consisting of: (1) 544.30 miles of non-contiguous rail main line known as the "southline" (which MRL will lease and have an option to purchase) between Huntley, MT (milepost 209.91) and Sandpoint, ID (milepost 2.79) in the Yellowstone, Spokane, and Montana Divisions; and (2) 286.32 miles of branch lines in Montana in the Spokane Division.[4] Under the agreement, MRL will also operate to

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[2] Comments in support of the MPSC petition were filed by: Montana Senator John Melcher; in support of Congressman Williams' petition by North Dakota Congressman Byron Dorgan; in support of the BGT petition by Snowy Mountain Ranch; and in support of the CATSS/RLEA petition by United Transportation Union (California). A comment was also filed by James W. Murry, Executive Secretary of the Montana State AFL-CIO.

[3] MRL also submitted statements in support from 47 shippers and businesses.

[4] MRL's original notice indicated that it would purchase outright the BN branch line from De Smet, MT to Paradise, MT. By letter filed October 28, 1987, MRL informed us that it now planned to lease that line with an option to purchase because of BN concerns

and from certain Idaho, Washington, and Montana points in the Spokane Division pursuant to incidental "bridge-only" trackage rights[5] over BN's rail line, and BN will retain certain bridge-only trackage rights in Montana.

In a decision served July 31, 1987, we denied petitions filed by the Transportation Division of the Department of Commerce of the State of Montana (MDOC) and by MPSC requesting a stay of the effective date of the exemption.[6] As a consequence, the exemption became effective on that date.[7] A notice of exemption was served

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about violating certain mortgage covenants if the line were sold at this time. In response, MPSC filed a petition to set aside the transaction. MPSC has argued that, because the original notice contained materially false or misleading information and because MRL failed to properly correct its original verified statement, the exemption is void *ab initio* and therefore an effective exemption was not in place at consummation. MRL replied. The statements contained in MRL's original notice were accurate at the time they were made. Moreover, MRL's filing of a letter to correct the record was fully in keeping with advice from Commission staff and followed normal Commission procedure allowing a minor, technical change to a notice of exemption to be made by letter rather than by the filing of a new notice. Consequently, we will deny MPSC's request to set aside this transaction. MPSC has not been prejudiced, as it was aware of the change.

[5] These rights are bridge-only in that MRL is not allowed to serve shippers located on the subject line, but is permitted merely to run its trains over the line.

[6] A petition for stay was also filed jointly by CATSS, United Transportation Union (UTU), Brotherhood of Locomotive Engineers (BLE), and Brotherhood of Maintenance of Way Employees, but we did not have an opportunity to consider it prior to reaching our decision served on the effective date of the exemption.

[7] In response, certain BN employee unions filed an unsuccessful action to enjoin the transfer in the United States District Court for the District of Montana (*United Transportation Union, et al.* v.

and published in the *Federal Register* on August 24, 1987 at 52 *Fed. Reg.* 31826.

In a decision served October 22, 1987, Chairman Gradison directed MRL to produce, under seal, within 5 days of the service date, its sale/lease agreement with BN and any auxiliary agreements or related documents for review by the Commission and the parties, subject to a protective order. To compile a complete record and to give any interested person the opportunity to comment, the Chairman also scheduled an oral hearing for November 5, 1987 at Missoula, MT. By decision served October 30, 1987, Chairman Gradison modified the October 22nd decision to allow MRL and BN to provide redacted (excised) versions of the agreements to all parties except MPSC and Attorney General Greely, which were given access to complete versions.[8]

The public hearing at Missoula, MT lasted 3 days, from November 5 through November 7, 1987. Primary issues raised included labor protection, competitive aspects of the sale, and MRL's viability. Opponents

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Burlington Northern Railroad Company, District Court of Montana, Docket No. CV-87-73-HCCL). Additionally, in *Burlington Northern Railroad Company* v. *United Transportation Union,* U.S.C.A., 8th Cir., Nos. 87-2600 WM and 87-2581 WM, BN is presently appealing the district court's denial of its motion for a preliminary injunction against a threatened strike, and UTU is appealing that court's issuance of an injunction that the court did impose pending BN's appeal. Finally, on December 4, 1987, a BN employee filed a lawsuit on behalf of himself and an alleged class of affected employees against BN, MRL, and various individuals alleging that the sale is a fraudulent conveyance under Montana law and challenging the Commission's jurisdiction and class exemption procedures (*Holmes, et al.* v. *Burlington Northern Railroad Company, et al.,* U.S.D.C., D. Montana, No. CV-87-250-GF-PGN).

[8] Private parties could gain access to an unredacted version by Commission order for good cause shown.

generally called for revocation of the exemption and further Commission review via investigation and trial-type hearing, while proponents stated that the transfer was in the best interests of Montana.[9]

By decision served November 27, 1987, Chairman Gradison granted a motion by MPSC to conduct further discovery on grounds that MPSC required access to relevant evidence solely in MRL/BN's possession to understand fully the agreement and meaningfully address various issues.[10] A procedural schedule was set for completion of discovery and the filing of supplemental pleadings by the parties incorporating the additional evidence derived from discovery.

By decision served December 7, 1987, Chairman Gradison directed evaluation of the eligibility of involved properties for the National Register of Historic Places pursuant to the National Historic Preservation Act. Pending completion of that process, the Chairman also directed MRL to refrain from taking any action that might jeopardize the historic integrity of sites and structures on the subject rail line that were 50 years old and older.

By decision served December 21, 1987, we denied for lack of good cause requests by CATSS/RLEA and BGT

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[9] A summary of the testimony of the various witnesses that spoke at the hearing is appended to this decision. We have fully considered the testimony in reaching our decision here. Also, various procedural objections and motions were raised at the hearing. Because these requests have been subsequently handled, or their disposition is not necessary for the resolution of the matters before us, or they are otherwise moot, we will not discuss them here.

[10] The Chairman simultaneously denied an MPSC request for a trial-type hearing with cross-examination because no need had been demonstrated for that procedure, particularly in light of the discovery authorization.

for unredacted versions of the sale/lease agreements. We also: (1) denied a BGT request for discovery; (2) concluded that BN/MRL had not violated Commission rules regarding notice and serviice; and (3) rejected a CATSS/RLEA assertion that we violated their due process rights by not permitting witness cross-examination at the hearing.

Pursuant to Chairman Gradison's decision of November 27, 1987, MPSC conducted further discovery by filing with MRL and BN some 43 written interrogatories with over 80 subparts and four requests for admissions. MPSC, MRL, and BN completed this phase of the proceeding on January 25, 1988, when they filed final supplemental pleadings incorporating the additional evidence obtained through discovery.

REVOCATION ARGUMENTS

1. *Applicability.* Several parties continue to maintain that the subject transaction is inappropriate for handling under our class exemption procedures codified at 49 CFR 1150.31 *et seq.*[11] In particular, MPSC argues that our class exemption rules should not be applied here since this transaction does not fall within the class of transactions originally considered by the Commission as the basis for the class exemption. In adopting the class exemption procedures, MPSC points out that the Commission reasoned that shortline acquisitions by noncarriers were rarely opposed and often drew little interest from the affected state. In contrast, MPSC states

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[11] The Commission's rules at section 1150.31 *et seq.* were adopted in *Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901,* 1 I.C.C.2d 810 (1985) (*Class Exemption*), *aff'd sub nom. Illinois Commerce Commission* v. *ICC,* 817 F.2d 145 (D.C. Cir. 1987) (*Illinois Commerce Comm'n*).

that this transaction has been very controversial. Specifically, it has been the subject of intensive media coverage, has prompted extensive discussion by the Montana Legislature resulting in legislation (House Bill 861), has resulted in the filing of lawsuits by affected labor unions, and has resulted in the filing of numerous petitions for stay and revocation by agencies of the State of Montana as well as others.

Similarly, MPSC argues that this transaction is atypical of those for which the class exemption was created since it will not merely result in continued rail service with no change in operations. Rather, MPSC states that terminal points will be moved to more distant locations and there will now be several interchange points along the line. While contract shippers on the line will still maintain their contracts with BN, MPSC points out that they will now be served by MRL.

MPSC further asserts that this transaction is unusual because the abandonment of the line has never been contemplated, as the southline currently earns a positive return. MPSC also argues that this is not a typical exemption proceeding because the State of Montana was not directly involved in the process in its early stages. MPSC claims that all of its early efforts to obtain detailed, specific information were largely unsuccessful, as MRL and BN argued that it was not entitled to such data and refused to provide copies of sale and other transfer documents. Lastly, MPSC argues that this transaction involves a vast territory containing over one-third of Montana's population and 30 percent of its rail lines and therefore is not limited in scope.

Senator Baucus maintains that our class exemption process when initiated was intended only to expedite shortline sales of fairly small, insignificant rail line segments were there was little or no controversy about

the desirability of a noncarrier taking over the line and/or a significant possibility that in the absence of exemption a line might be abandoned during the course of normal review procedure. He states that such factors are not present here. The remaining petitioners and a number of commentors and hearing witnesses agree that a sale of this magnitude should not be automatically exempted from Commission review under our class exemption procedures.

CATSS and RLEA make several additional arguments related to the applicability of our class exemption rules to this transaction. First, they contend that our general exemption authority under 49 U.S.C. 10505 upon which we relied in adopting our class exemption procedures does not extend to exemptions of a "class of transaction." Second, they point out that this transaction involves non-contiguous lines. They therefore conclude that MRL should have lost its noncarrier status upon its purchase of one of the lines, thus making the remaining purchase subject to the provisions of 49 U.S.C. 11343 and the mandatory imposition of labor protection. Similarly, they assert that the exemption statute and our regulations authorize exemptions only with respect to one line, not two as here. These petitioners also claim that MRL may not have been a qualified noncarrier in the first place because Wertheim, Schroder & Company (Wertheim), an investment banking firm which may have a substantial ownership interest in MRL, already has an interest in the carrier MidSouth Rail Corporation (MidSouth Rail).

In reply, MRL asserts that the class exemption applies to all acquisitions and operations under 49 U.S.C. 10901, except for certain limited exceptions (which they state the petitioners do not claim are applicable here). Because this exemption promotes the national rail

policy, is limited in scope, and regulation is not necessary to protect shippers from the abuse of market power, MRL argues that whether or not this transaction is "typical" of those usually filed under our class exemption procedures is irrelevant. MRL contends that shipper protection is not necessary here because, at the very least, the transaction will maintain the competitive *status quo*. MRL also asserts that the transaction is limited in scope because the majority of the involved trackage is in Montana and its operation essentially will be developed from, and directed toward, the needs of a single state. MRL claims that the Commission has already granted similar exemptions involving more mileage, population, major metropolitan areas, states, revenues, and/or traffic than here, citing, *e.g.*, Finance Docket No. 30889, *Dakota, Minnesota & Eastern Railroad Corporation–Acquisition and Operating Exemption–Chicago and North Western Transportation* (not printed), served September 8, 1986; and Finance Docket No. 31102, *Wisconsin Central Ltd.–Exemption Acquisition and Operation–Certain Lines of Soo Line Railroad Company* (not printed), served September 11, 1987 (*Wisconsin Central*).

Although this sale has generated a great deal of interest in Montana, MRL argues that there is little opposition outside of certain labor unions and notes that many shippers actively support the proposal. MRL and BN deny petitioners' claims alleging secrecy and lack of information with regard to the transaction. Rather, they point out that the people and officials of the State of Montana have received much more information (including information of a proprietary nature) through responses to interrogatories, requests for admission, and other questions, and through public hearings and private meetings than is required or is customary in such

transactions. MRL asserts that our prior stay decision already resolved the applicability question in its favor by correctly finding that this transaction is appropriate for treatment under the class exemption at 49 CFR 1150.31.

Additionally, MRL denies the CATSS/RLEA claim that it may not have been a noncarrier at the time it filed under our class exemption rules. MRL states that Wertheim has no interest whatsoever in MidSouth Rail. MRL acknowledges that WERCO Partners (WERCO), a related partnership, does have a minor, non-voting stock interest in MidSouth Rail's parent company, MidSouth Corporation. According to MRL, Prospect Group, Inc. (Prospect) owns 100 percent of the voting stock of MidSouth Corporation, which owns all of the stock of MidSouth Rail, and thus, Prospect controls both MidSouth Corporation and MidSouth Rail. Since neither Wertheim nor WERCO has a controlling interest in either MidSouth Rail or it, MRL concludes that there is no merit to petitioners' "noncarrier" argument.

MRL also addresses the CATSS/RLEA argument that this transaction does not qualify for an exemption on the grounds that it involves more than one rail line. MRL notes that section 10901 and our class exemption from that statutory provision apply to a noncarrier simultaneously acquiring non-contiguous lines when those lines are already under common control. In support, MRL cites Finance Docket No. 30807, *MidSouth Rail Corporation–Acquisition and Operation Exemption to Acquire and Operate Portion of Illinois Central Gulf Railroad Co.'s Line* (not printed), served March 26, 1986.

Finally, hearing witness Scott, Vice President Marketing, BN, has responded to the claim that the involved lines have not been and will not be subject to abandon-

ment. Although the main line here is not currently being considered for abandonment, he states that it could become subject to abandonment over the long term. He adds that the branch lines are, in fact, candidates for abandonment in the near future.

2. *Viability.* Petitioners CATSS/RLEA, Williams, and TCU question whether MRL has sufficient financial resources, expertise, and equipment to provide continuous, efficient, and safe operations over the acquired lines. They are particularly concerned that MRL may be unable to maintain labor stability, properly handle hazardous wastes, cope with major disasters, keep this national defense route open, and provide better or at least comparable service and rates over the long term to shippers. TCU states that it is concerned that MRL will be in debt from the purchase, and that its revenues would first have to be used to pay its initial debt plus interest instead of going for track maintenance, physical plant upkeep, employees' salaries, and stockholder profits.

MPSC argues that this transaction will create a new Class II carrier that will be financially "captive" to BN, contrary to Congressional concerns over the economic well being of shortline and regional carriers. MPSC claims that payments by MRL to BN under the sale/lease agreement apparently "ratchet" up and down according to the level of traffic on the MRL line, thereby potentially preventing MRL from receiving revenues and profits generated by improved operating efficiencies. Although BN has guaranteed annual revenue to MRL equal to 75 percent of BN's 1986 bridge traffic, MPSC contends that this does not necessarily eliminate the potential for abuse, because this revenue alone is insufficient to sustain MRL's continued operation. Additionally, MPSC points out that BN owns and operates a

competing route and will continue to serve the majority of current shippers on the line pursuant to existing contracts. MPSC argues that these factors will encourage BN to move traffic over its own competing long haul routes instead of over MRL in order to maximize its own revenues and profits. By rerouting loaded cars and reducing MRL's revenues, MPSC claims that BN can exert anticompetitive pressures on MRL. Finally, MPSC notes that, under current arrangements, MRL will be dependent upon BN for significant amounts of equipment.

Commentor Murry, Executive Secretary of the Montana AFL-CIO, asserts that MRL experienced serious safety problems during its first ten weeks of operation. Specifically, Murry claims that there were at least five derailments—including one allegedly resulting in a "near disastrous" rupture of a tank car. Murry blames these problems on MRL's working conditions, *i.e.*, longer trains, longer runs, lower wages, no cabooses, and smaller crews. Murry is concerned that MRL will not have sufficient financial resources to indemnify communities against accidents and continue to operate the railroad.[12]

A number of hearing witnesses also question MRL's viability. They are particularly concerned that MRL might cut corners with respect to safety, citing a lack of experience, training, and employees.

In response, MRL notes initially that the burden is on petitioners to demonstrate that MRL lacks adequate resources to provide adequate transportation service,

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[12] In addition to his initial submission, Mr. Murry filed a letter in reply to an MRL reply in which he alleges inconsistencies based on Montana newspaper articles in statements made by MRL personnel concerning safety matters.

since the Commission specifically rejected imposing a requirement in *Class Exemption* for the submission of detailed financial and operating data. Although it was not required to do so, MRL states that it has provided MPSC with information concerning its financial resources, including that: (1) Dennis Washington, a prominent and successful Montana businessman, will own 80 percent of MRL's equity; (2) BN has assured MRL that it will earn a minimum level of revenues; and (3) MRL plans to carry $40 million in liability insurance and $15 million in property damage insurance.

MRL adds that it has attracted sufficient funding from private sector sources to purchase this property and commence operations, and that it will not have to increase rates or call upon Montana taxpayers to finance this transaction or subsidize its operations. MRL states that, barring some unforeseen catastrophic event, it will be able to repay its debt from its own revenues. Since it began operations on October 31, 1987, MRL states that it has been successfully delivering reliable, efficient, low-cost service while still earning a respectable return.

MRL also denies that it will be financially captive to BN. As a sophisticated, arms-length buyer, it has had to assure itself that BN will not be able to "squeeze" its profits, and it has had to persuade investors and financial institutions that it will be able to generate an annual profit. In support, MRL cites the long-term agreement referred to by MPSC in which BN will ensure that MRL will earn a minimum annual revenue (equal to 75 percent of BN's 1986 bridge traffic). According to MRL, this revenue alone is sufficient to sustain its operations through all cyclical ups and downs in the economy. MRL also points to agreements it has with BN ensuring that it will receive an equitable division of joint rates. It

further notes BN's strong incentive for MRL to be able to finance efficiency-increasing improvements, since BN will depend on it to maintain several hundred miles of track forming a critical segment of BN's transcontinental route. Finally, MRL states that the Commission has the right to require divestiture when and if captive carrier evidence is presented.

MRL states that it has purchased 52 locomotives from BN (20 of which are high horsepower), as well as approximately 560 freight cars. It adds that additional freight cars can be obtained from BN or directly from other sources if needed, or it will grant OT-5 authority to shippers on its line, allowing the loading of non-railroad owned cars. Although MRL acknowledges that it is experiencing a shorting of BN covered hopper grain equipment and bulkhead flatcars, it claims that the problem is systemwide and that all bulk grain and lumber shippers have been affected. It states that shippers on MRL are being allocated cars on an equal basis with all shippers on the BN system.

MRL states that it has sufficient personnel, in-house expertise, and financial resources to conduct safe operations. It strongly refutes the suggestion by commentor Murry and others that it is "cutting corners" on safety. MRL notes that it has assembled a knowledgeable, experienced, and dedicated safety team and notes, in particular, that its president, William Brodsky, previously held the position of Director, Hazardous Material Control, with the Santa Fe Railroad. MRL adds that it has adopted all of BN's safety policies while implementing several new programs of its own. It has increased the number of required safety meetings for employees and invested in improved communications equipment. MRL claims that its efforts have resulted in a better safety

record than BN when measured by a ratio of frequency and severity of accident to train miles operated.

MRL also denies that its working conditions were the cause of any of the accidents cited by commentor Murry. Specifically, MRL asserts that its trains are the same length as BN's were, that its runs are the same length (with one exception), that its wages are very reasonable, that it uses the same number of cabooses as BN did, and that its reduced crew sizes have had no effect on safety. As to the tank car accident, MRL asserts that the situation was never a "near disaster" because of the special construction of the chlorine tank cars and because its personnel were on the scene within minutes and followed all proper safety procedures. MRL states that it has sufficient insurance and financial resources to continue to operate even in the highly unlikely event that a significant accident did occur.

Finally, witness Lowenthal, a managing director of Wertheim, testified that MRL is financially viable, pointing to MRL's $5 million of common equity, a $30 million loan from the Bank of America, and substantial commercial liability and property damage insurance. Witness Brodsky, MRL's President, claims that safety will, in fact, be stressed at MRL. For example, he states that MRL has hired experienced safety personnel and has adopted BN's hazardous materials program while working to develop its own.

3. *Competition.* MPSC contends that this exemption should be revoked because the transaction will not foster rail competition in furtherance of the national rail transportation policy,[13] and that competitive alternatives available to shippers along the subject line might be reduced or eliminated. Additionally, MPSC contends that the BN/MRL agreement contains anticompetitive

[13] The national rail transportation policy is set forth at 49 U.S.C. 10101a.

restrictions and reflects an intent by BN to eliminate or at least limit access by MRL to competitive gateways (interchange points).

In support, MPSC states that BN will be the only connecting carrier at each end of the new operation (Huntley, MT and Sandpoint, ID), and states that BN owns and operates a route which directly competes with the through route transferred to MRL. MPSC claims that all gateways to carriers competitive with BN are located on the lines remaining under BN's ownership and control and over which MRL will only have trackage rights. MPSC asserts that the bridge-only trackage rights grant does not provide for direct access by MRL to these competitive gateways, which are as follows: (1) Garrison/Silver Bow, MT [to the Union Pacific Railroad (UP) and Montana Western Railroad MW)]; (2) Sandpoint, ID [to the Spokane International Railroad (SI)]; and (3) Spokane, WA (to the UP). Rather, under these trackage rights, MPSC claims that MRL is limited merely to effecting interchange with BN and bridging unconnected portions of the lines MRL is leasing. On the other hand, MPSC argues that the grant of all trackage rights to BN contains specific language assuring that carrier of access to competitive gateways.

As further evidence of the anticompetitive nature of the transaction, MPSC cites the supplemental rental charge and/or per carload penalty provisions of the acquisition agreement. Under those provisions MPSC asserts that MRL must pay to BN such a charge for every car interchanged at Spokane, Sandpoint, or any other interchange point established by MRL with any carrier other than BN, if that carload does not meet certain requirements and restrictions designed to protect

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[13] The national rail transportation policy is set forth at 49 U.S.C. 10101a.

BN's existing traffic. MPSC argues that, because of such charges, the rate which MRL will have to quote a shipper for that traffic will render economically prohibitive the use of a carrier competing with BN and effectively eliminate the interchange of such traffic. Although the carriers have stated that these supplemental charges are designed merely to ensure that existing traffic will move in the same manner as it did prior to the transfer, MPSC claims that such charges have been improperly applied to certain pre-existing shipments.[14]

As previously stated, MPSC asserts that access to the MW and UP through Garrison by MRL shippers and receivers is limited solely to existing traffic currently moving through that gateway. MPSC alleges that these anticompetitive restrictions essentially serve to compensate BN for any lost revenues and to ensure that BN will not suffer any deterioration of its dominant market power in Montana, contrary to the interests of area shippers. It claims that our implicit approval of such provisions is inconsistent with the Staggers Act policy of eliminating noncompensatory rates.

MPSC further asserts that shippers and receivers along the transferred line will suffer because competitive route and carrier alternatives available to them prior to the sale will now be severely restricted or eliminated. MPSC believes that BN's control over rates and contracts, as well as the accompanying penalties and restrictions of the acquisition agreement, means that traffic which could have moved to competitive markets on BN or UP prior to this sale will now only have BN as a realistic option.

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[14] In support, MPSC provides specific examples of shipments subject to the charges that BN had historically interchanged with the SI or UP.

Attorney General Greely has also expressed concern that MRL is competitively captive to BN at both ends of its line and that MRL is effectively precluded from interlining with the UP at Butte, MT to provide a true competitive alternative for southline shippers. He asks us to make sure that there are no penalties for MRL interlining with other carriers at Spokane, because BN has reportedly exacted such penalties in some of its sales. He adds that, if particular conditions are necessary to make this sale pro-competitive, the Commission should impose them.

Petitioner Williams asks us to determine the contractual restraints on interline traffic, if any, between BN and MW as they might affect MRL. He also requests that we review any proposed contractual agreements that would impede interline traffic between MRL and UP. He has expressed concern that the transaction will prevent genuine competition and appropriate market access due to BN's retention of ownership of the approximately 50 miles of line linking the two mainline segments acquired by MRL.

Petitioners CATSS/RLEA agree with the other petitioners that this transaction will not foster competition. They express particular concern that shippers may become captive to BN.

Representative Dorgan is concerned that the contract between BN and MRL may contain certain provisions that constitute restraint of trade and threaten MRL's economic independence. He doubts that this sale will in any way promote competition.

Petitioner BGT is a grain buyer and shipper located in Billings, MT on the BN line transferred to MRL. It claims that, shortly after the BN/MRL sale announcement, BN unfairly singled it out for a substantial rate adjustment while its competitors located both on and off

the line to be transferred were not subjected to any increase. Specifically, it asserts that its prior rate advantage (allegedly justified due to large volume commitments) of 6 cents per hundredweight then became a rate disadvantage of 4 cents per hundredweight. It adds that BN has since restored BGT's rate advantage, but only at a 2 cent per hundredweight level and that BN soon plans to lower BGT's 52-car rate, thus causing BGT and grain growers injury by further hampering BGT's buying efforts. BGT claims that BN's action demonstrates its willingness to abuse its market power by: (1) raising BGT's rates to divert its business to elevators on BN, thus increasing business on BN at the expense of it and MRL;[15] (2) retaining ratemaking rights over MRL on all interline shipments; and (3) preventing MRL from making rates or interchanging with carriers other than BN.

In negotiations after the acquisition by MRL was announced, BGT asserts that BN refused to restore historical rate levels that existed prior to the announcement, and would not assure it any rate adjustment protection or historical cross-country rate differentials protection. If its concerns can be met by BN and MRL through the imposition of protective conditions, BGT states that it would be willing to support the transaction.

Snowy Mountain Ranch of Lavina, MT sells grain to BGT via rail. If BGT's price to it reflects BGT's increased transportation costs, it claims that it will either have to sell its production to one of the Central Montana elevators on the BN instead of to its preferred outlet,

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[15] For example, BGT states that as rail rates stood on October 7, 1987, for it to maintain its annual capacity of handling 5 million bushels, it would have to convert nearly half of that amount to truck transportation, resulting in an annual traffic loss to MRL of some 2 million bushels or about 600 carloads.

BGT, or it will be forced to accept less money from BGT for its grain crop. It does not like either option and, accordingly, opposes this sale until BGT can again offer competitive prices, which it states BGT could do if we imposed protective conditions.

Finally, many witnesses at the public hearing, particularly those representing Montana state agencies, expressed concerns about MRL's competitive access to carriers other than BN at various gateways on the line and called for the Commission to impose pertinent conditions.

In response, MRL argues that this transaction is not anticompetitive. It acknowledges that it cannot interchange with the UP and SI at the Spokane Joint Facility. However, MRL characterizes this as irrelevant because it prefers to and does interchange traffic with SI at Sandpoint, which is competitively equivalent to interchanging at Spokane. As to the supplemental rental charges, MRL claims that such charges do not apply to much of the traffic it interchanges with SI at Sandpoint, and that such charges are, in fact, designed only to ensure that existing traffic will move in essentially the same manner as it did prior to the transfer. MRL (and BN as well) does acknowledge that MPSC is correct that certain traffic historically interchanged by BN with SI or UP is subject to supplemental charges under the existing agreement. It claims that the parties did not intend for such traffic to be subject to the charges and that BN has agreed not to charge MRL for those or similar movements. MRL states that the parties will amend the agreements accordingly. MRL also asserts that traffic properly subject to such charges has historically moved over BN lines and, if BN had retained the transferred property, shippers would have no choice but to route the traffic over BN anyway. According to

MRL, shippers and MRL now have the new option to interchange with SI and pay the charges if market forces dictate that such an option is more economical.

With regard to the Garrison gateway, MRL claims that traffic that BN historically interchanged with other carriers at Garrison/Silver Bow is not subject to any supplemental charge or restrictions. It adds that MRL is free to develop new traffic through that gateway subject to agreement with all carriers participating in the route as to the through rate and their respective divisions.

MRL claims that the net result of this transaction is that existing traffic will move as it did prior to the transfer, with some added flexibility. It states that MPSC itself has admitted that this transaction will maintain the *status quo* and will not change the competitive situation, and it asserts that such a scenario is fully in accord with Commission class exemption procedures. MRL argues that MPSC is incorrect in arguing that those procedures require that a transaction of this type actually promote competition or result in increased competition.

Nevertheless, MRL contends that this transaction will, in fact, promote intermodal and intramodal competition at the national, regional, and local levels. With its entry, it claims that joint BN/MRL service will be able to compete more effectively with UP, the owner of the other independent, direct rail main line connecting the Pacific Northwest and the Central States. The result, it asserts, will be improved service and lower transportation costs for shippers. MRL adds that its entry will also improve regional competition by introducing a new rail carrier to compete with BN in Montana. Furthermore, MRL claims that its lower costs will enable it to serve BN's intermodal hubs much more effi-

ciently than BN had in the past, thus permitting the BN/MRL combination to compete more effectively for truck traffic.

Both BN and MRL ask that the Commission not intervene in this transaction to impose unnecessary conditions. MRL fears that any such action would endanger the agreement by threatening the viability of this new operation. Moreover, MRL points out that both parties have the agreed upon right to walk away from the transaction should it be materially conditioned, thus depriving shippers, which almost uniformly support the transfer, of its benefits.

Finally, MRL asserts that this transaction will also serve other rail transportation policy goals, including minimizing the need for Federal regulatory control (section 10101a(1)), ensuring the development and continuation of a sound rail transportation system (section 10101a(2)), fostering sound economic conditions in transportation (section 10101a(3)), reducing regulatory barriers to entry (section 10101a(4)), encouraging efficient rail management (section 10101a(5)), promoting safe and efficient rail transportation (section 10101a(7)), and encouraging competition for services at reasonable rates (section 10101a(10)).

BN has also submitted extensive responses to the charges that the transaction is anticompetitive. BN points out that its ownership of the major rail lines in Montana has been approved by the Commission and the Supreme Court,[16] and substantially predates this transfer. Thus, BN argues that any transaction which at least

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[16] In support, it cites *Great Northern Pac.–Merger–Great Northern*, 331 I.C.C. 228 (1967), *aff'd* 296 F. Supp. 853 (D. D.C. 1968), *aff'd sub nom. United States* v. *ICC*, 396 U.S. 491 (1970) (*Northern Lines*).

maintains the level of competition in Montana that prevailed under BN's ownership of the southline may not be challenged as anticompetitive. Furthermore, BN claims that MPSC has failed to show any anticompetitive consequences flowing from the transfer. It argues that MPSC is in error in contending that access to the MW and UP through Garrison by MRL shippers/receivers is limited by the agreement to existing traffic currently moving through that gateway. To the contrary, BN asserts that the agreement clearly gives both MRL and BN the right to negotiate and agree on joint interline rates and routes on all new traffic that can move in this manner.

BN explains that the supplemental rental charges were designed to structure the transaction in a way that gives BN a fair return on the value of its transferred property and, at the same time, fosters MRL's economic viability by minimizing its debt burden and maximizing its opportunity for success. BN claims that it would have been impossible for MRL to finance a purchase price reflecting the full going concern value of the transferred properties, when MRL's payment of the heavy debt service on that price would have had to be secured by the revenues generated by predominantly bridge traffic. Furthermore, BN adds that MPSC talks about the effect of these charges on alternative routes for traffic on MRL's line, but it has failed to show that any alternative route: (1) is feasible; (2) is as efficient as the route over which it now moves; (3) would ever be preferred by any shipper; or (4) currently has in place a rate or route.

BN states that it did not retain trackage between Helena and Phosphate for any anticompetitive purpose. Rather, BN explains that it retained this trackage: (1) to preserve an efficient connection between its line from

Helena north to Canada (via Sweet Grass) and its interchange with the UP at Silver Bow via MW in anticipation of greater Canadian- origin traffic in the future; and (2) to retain a direct connection from Helena to MW at Garrison, which is required for BN to meet its contractual obligations to that carrier.

Rather than reducing competition, BN agrees with MRL that this transaction will increase intermodal competition. BN contends that MRL's lower operating costs, aggressive local marketing efforts, and flexible work rules will better enable MRL, and MRL and BN in joint movements, to compete with trucks moving on the interstate highway that parallels this main line. Similarly, BN agrees with MRL that the transaction will likely improve intramodal competition by enhancing the ability of joint BN/MRL service to compete with UP's transcontinental service. BN believes that MRL, as a locally-based new carrier, will be able to offer shippers a more economical, efficient, flexible, and responsive rail service. It also asserts that the MRL operation will prevent further traffic declines, better avoid the possibility that the involved branch lines will become uneconomical and unsuitable in the future, and create incentives for rail patrons to use rail instead of motor carrier transportation.

As further evidence that the subject transaction will not have anticompetitive effects, BN states that 41 shippers and 28 non-shipper parties support the proposal, while 15 shippers have taken a neutral position. It also claims that, to its knowledge, only four shippers oppose the transaction, and that only one of those, BGT, ships by rail.[17] BN claims that BGT offered to support the transaction, but only if BN would agree to a substantial

[17] These parties are listed in BN's pleading.

rate reduction. BN states that it refused to do so, stressing that it would be inappropriate to strike a deal with a single shipper that might create an imbalance in the rate structure in circumstances where the transaction would not adversely affect that shipper's rates. BN contends that BGT is wrong in asserting that the single-car rate at Columbus, MT will be nearly equal to its 52-car rate. Rather, BN states that an upcoming tariff revision will establish a straight 5 percent increase on Montana wheat rates to the Prescott and Northwestern Railway Company, resulting in a single-car rate from Columbus of 121¢/cwt rate. It concludes that BGT's rates have been determined purely by competitive forces and are not punitive or retaliatory.

Finally, all shipper and business witnesses at the hearing except for two support the transfer. The majority cite past problems with BN's service, and they believe that MRL's new, locally-managed operation will provide them with better service at reduced rates. Witness Carter, BN Vice President, Agricultural Commodities Unit, argues that the carrier's rate actions vis-a-vis BGT were fully justified and unconnected to this sale. He states that BN is not trying to divert MRL traffic and asserts that BGT rates are actually lower than they should be.

4. ***Labor issues.*** Petitioners CATSS and RLEA contend that this case is not a typical exemption and involves significant employee protection issues. As such, they argue that our exempting the transaction from labor protective provisions without first conducting a review (through investigation and hearings) violated 49 U.S.C. 10505(g)[18] and 10901(e).[19] They also contend

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[18] Section 10505(g) states that the Commission may not exercise its authority under that section ". . . (2) to relieve a carrier of its

that our action violated the "rule" that the exercise of our discretionary labor protection authority in approving an acquisition must be based on well-reasoned decisionmaking.[20]

CATSS and RLEA are concerned about the potential harm to affected railroad workers stemming from this sale. They claim that at consummation the approximately 1,200 BN workers on this line lost their protection under current collective bargaining agreements. They assert that these workers have been left almost totally in the dark as to their employment future, leading to extreme uncertainty and distress for workers and their families, and to a decline in employee morale, and adverse impacts on service, safety, and efficiency. According to these petitioners, affected workers have been given little or no information or assurances regarding rehiring, seniority rights, wage levels, or employment benefits, conditions, and locations.

CATSS/RLEA claim that BN is only "considering" providing certain employee protections like severance payments and incentives, and that any such protections

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obligation to protect the interests of employees. . . ." Section 10505 confers general exemption authority on the Commission and serves as the basis for our class exemption for the acquisition of a rail line by a noncarrier that otherwise would be subject to the requirements of 49 U.S.C. 10901.

[19] Section 10901(e) states that the "Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to Section 11347 of this title."

[20] In support, they cite *Railway Labor Executives Ass'n* v. *ICC* 825 F.2d 238 (9th Cir. 1987) (*RLEA*).

will be offered only to extremely limited classes of persons. Petitioners further claim that only a small percentage of affected workers have any kind of job protection imposed pursuant to prior BN mergers,[21] and they assert that BN's cost figures for labor protection are greatly exaggerated, unsupported, and contrived.

MPSC claims that this transaction may not encourage "fair wages and safe and suitable working conditions in the railroad industry," contrary to the national rail transportation policy at 49 U.S.C. 10101a(12). Despite MRL promises regarding the hiring of local labor, MPSC asserts that it received a notice in August 1987 prepared by the Alaska Railroad Corporation announcing that MRL had contacted it to solicit applications for between 500 and 700 positions with MRL "in all walks of railroading," and indicating that wages are planned to be "lower than [the] national average."

TCU asserts that about 450 rail and 550 non-rail jobs will be lost as a result of this sale. It also fears that the Railroad Retirement System will be adversely affected because fewer persons will be paying into the system, and those that are contributing will be paying in less because they will be earning less.

Senator Melcher states that he is concerned that many labor-related details of this transaction have been "enshrouded in secrecy." Although he acknowledges that BLE officials have reached an agreement with MRL, he notes that those discussions took place outside Montana, did not involve any Montana union members, and prescribed a significant reduction in work force and

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[21] Petitioners argue, for example, that only 32 of 147 UTU Local 685 members are merger protected, as are only 12 out of 65 in Local 1703, and only 46 of 179 in Local 978. This amounts to around 23 percent of those employees.

compensation. He also claims that the agreement has not been accepted by involved Montana workers.

A number of witnesses at the hearing claim that BN is trying to "bust" the unions. They also contend that MRL's pay and benefits will be inferior to BN compensation, and that most employees do not have any form of employee protection. They callfor the Commission to impose labor protection here. Witness Blakeley, a BN conductor and local UTU officer, claims that only about a third of the workers have lifetime job protection. Witnesses Bachini (a conductor and member of the Montana Legislature) and Merseal (a BN crane operator) are particularly concerned about the future of the Railroad Retirement System.

In response, MRL claims that the Commission's statutory authority to exempt transactions of this type without imposing labor protection or holding a full hearing is well-established, citing our class exemption procedures and their subsequent affirmance in *Simmons* v. *ICC* 829 F.2d 150 (D.C. Cir. 1987). MRL also claims that the various cases relied upon by petitioners hold only that the Commission must address labor protection in its order if the issue is raised, but that even brief summary statements are sufficient if substantive.

MRL points out that the Commission stated in *Class Exemption* that it would not revoke an exemption on labor protection grounds absent a finding of "exceptional circumstances," and that petitioners have not shown such circumstances here. Indeed, MRL argues that this exemption will ensure fair wages and safe and suitable working conditions. MRL claims that it has already reached an agreement with 300 BLE operating employees and that the agreement includes improved quality-of-life provisions, competitive hourly wage rates, profit-sharing, a 401(K) plan, and medical, dental,

life, and disability insurance plans. MRL adds that it has also reached agreement concerning approximately 400 non-operating positions with the following RLEA member organizations: the Brotherhood of Maintenance of Way Employees, the Brotherhood of Railway Carmen, the Brotherhood of Railroad Signalmen, the International Association of Machinists and Aerospace Workers, the International Brotherhood of Electrical Workers, the International Brotherhood of Fireman & Oilers, and the Transportation Communications International Union (formerly, the Brotherhood of Railway and Airline Clerks).

MRL adds that it has afforded BN workers a hiring preference and will offer jobs to experienced BN employees to the extent possible. MRL states that it has already hired over 400 such employees. Under the MRL/BLE agreement, MRL asserts that former BN employees that are hired will retain their BN seniority date for seniority and vacation purposes, and that, although other new employees will be hired at entry level wages, such wages will not be applied to BN employees starting their employment with MRL during its initial operations. MRL also states that its president, William Brodsky, has discussed employment opportunities at various meetings with BN employees.

Although MRL acknowledges that its specific wage rates will be lower than BN's, MRL claims that the 25-60 percent figures cited by petitioners are inaccurate. Although wages in some cases may be approximately 20 percent lower, MRL points out that it will offer its employees a profit-sharing plan and a supplemental retirement plan that BN does not provide. Finally, MRL acknowledges the economic crisis facing the Railroad Retirement System, but asserts that revoking its exemption here is not a solution. It believes that Con-

gress, rail management, and labor are the appropriate parties to address the problem, and not the Commission.

BN has also responded to the charges relating to the impact of the transaction on rail employees. BN asserts that any potential adverse effects of the transaction on employees will be largely mitigated by various programs and protections available to them. It claims that a large percentage of current BN employees (578 out of 1,024 or over 56 percent) already have the benefits of existing labor protection from the 1970 Northern Lines Merger and other prior transactions. It adds that MRL will hire approximately 750 employees[22] (only about 250 fewer than BN employed on the line) and that this will greatly exceed the number of unprotected BN employees. BN also points out that many of its existing employees displaced or furloughed will be able to retain and exercise seniority to work in other locations on the BN system, and in any event that they may be recalled if business conditions warrant. BN adds that such employees may also be able to avail themselves of benefits under railroad unemployment programs, insurance benefits, and other offers of employment where openings may be available outside their seniority districts. More specifically, BN states that it is in the process of implementing an incentive program offering benefits to certain existing BN employees who elect to work for MRL, including a 2-year leave of absence from BN with guaranteed re-employment with BN during that period should that employee be released by MRL during his or her probationary period, or if his or her position is abolished. BN states that it is also considering offering

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[22] According to testimony at the hearing, this figure was subsequently revised by MRL to 676 (see Brodsky statement p. 648).

severance payments to certain employees and may extend the aforementioned incentive program to other employee groups working in the involved territory and who are covered by the 1970 Northern Lines Merger protective conditions.

BN acknowledges that its employees were kept somewhat in the dark about this transaction in its early stages. However, BN submits that it would have been irresponsible and even more unsettling overall to have provided partial information when plans, options, and opportunities were still uncertain. It also points out that MRL officials did hold a series of well-publicized meetings with prospective employees to provide information and answer questions.

Finally, should unnecessary labor protective conditions be imposed here, BN claims that the cost would be so immense as to render the transaction uneconomical for both it and MRL.[23] As a result, BN states that both parties have agreed in their contract not to proceed with the transaction if labor protection is imposed.

Hearing witness Scott states that BN is not trying to harm the unions here or dispose of assets. However, he asserts that BN cannot conduct efficient operations over these lines because of inflexible work rules and high labor costs. Witness Sheak, BN Director Employee Relations, Seattle Region, states that 594 of 1,107 affected employees (54 percent) have Northern Lines Merger protection or some form of negotiated protection, including wage guarantees, moving benefits, and

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[23] For example, BN asserts that, under a worst case scenario with MRL employing no affected BN employees, BN would be required to pay labor protection costs of approximately $352.5 million. We note, however, that MRL has already hired many former BN employees, which clearly would render this figure excessive.

seniority retention. Witness Brodsky asserts that the labor agreements MRL has concluded with various unions trade off necessary wage reductions and work rule changes resulting in more flexibility in return for improvements in benefits and quality-of-life provisions. He claims that, with better benefits than BN, MRL employees will earn 85 to 90 percent of their BN salaries. He also states that MRL has hired 533 of the 676 total employees it will need (342 of them from BN).

5. *Other issues.* Petitioners CATSS/RLEA and Attorney General Greely contend that this transaction may violate the so-called "commodities clause" of the Hepburn Act, codified at 49 U.S.C. 10746.[24] They assert that Dennis Washington, MRL's primary stockholder, is also the primary stockholder in Montana Resources, Inc. (MRI), a mining corporation located in Silver Bow County, MT. They assert that MRI's molybdenum products are now transported over the BN lines that were conveyed toMRL, but that such products are not necessary to, or intended for, MRL's use, as required to avoid a violation of the statute in this situation. They also claim that this situation may therefore have anticompetitive effects. Hearing witness Murry agrees.

In reply, MRL claims that its operation will not violate section 10746. MRL states that the subject prohibition applies only to a carrier's ownership of, or authority over, the manufacturing process of the given commodity moving via the carrier rather than where there is merely common ownership of the carrier trans-

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[24] That clause is directed to the transportation by a rail carrier of an article or commodity that is manufactured, mined, or produced by a carrier, or under its authority, or that is owned by the carrier, or in which it has an interest, unless such product is necessary and intended for use in the carrier's business.

porting, and the shipper producing, the commodity. It notes further that a violation is not established by such common ownership (or even common directors or officers) unless the two companies have been operated with a total disregard for the legal distinctions between them.[25] It adds that the mere possibility of the shipper having influence over the railroad is insufficient in and of itself to establish a violation, citing *Florida East Coast Railway Reorganization*, 307 I.C.C. 5, 18 (1958). Since it will have no interest in any mining operation and will have a distinct and separate corporate structure with different shareholders than its mining affiliate, MRL concludes that petitioners' commodities clause argument has no merit.

Finally, TCU argues that this transfer is improper because BN should not be allowed to lease or sell the property. It claims that the subject land and other valuable resources were given to BN as part of the original Northern Pacific Land Grant Act of 1864, and, therefore, the railroad and land grant properties must be kept together. Hearing witnesses Bachini and Marceau (UTU local Chairman) agree and contend that this land should revert back to the United States if BN is no longer going to provide service.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10505(d), the Commission may revoke an exemption, in whole or in part, when it finds that application of a provision of Subtitle IV of Title 49 to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of

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[25] In support, it cites *United States* v. *Elgin, J. & E. Railway Co.*, 298 U.S. 492 (1936); and *United States* v. *Lehigh Valley R. Co.*, 220 U.S. 257 (1911) (*Lehigh Valley*).

Title 49. Upon review of the extensive record before us, we conclude that petitioners have failed to demonstrate that regulation of this transaction is necessary to carry out the national rail transportation policy. Consequently, we will deny their request for revocation of this exemption (and for imposition of labor protection or further investigation).

1. *Applicability.* As noted above, petitioners assert that this transaction is not appropriate for treatment under the class exemption at 49 CFR 1150.31. They again cite the magnitude and significance of the transaction in support of their position. However, that issue has already been raised and rejected in our prior stay decision, and petitioners have failed to present any new evidence or arguments warranting a different conclusion.

In our stay decision, we indicated that our class exemption is not confined to shortline sales, that the size of the transaction alone is not dispositive of the applicability of the exemption, and that nothing in our rules or decision adopting them limits the use of the exemption to short lines or to insignificant transactions. *See also* Finance Docket No. 31121, *P&LE Railco, Inc.–Exemption Acquisition and Operation–Lines of the Pittsburgh and Lake Erie Railroad Company and Youngstown and Southern Railway Company* (not printed), served December 5, 1986. Even though the standards of section 10505(a)(2)(A) or (B) are not relevant to the request for revocation here, we note that one reason size is not a determinative factor under the class exemption is that 49 U.S.C. 10505 provides "harm to shippers" as an alternative criterion to the "limited scope" test. While the sole standard is whether regulation is necessary to carry out the transportation policy of 49 U.S.C. 10101a, we believe that this transaction is limited in

scope as being less extneisve than certain transactions we have exempted by petition (TOFC/COFC traffic, boxcars, etc.) and by notice (*e.g., Wisconsin Central, supra*), the evidence also establishes that regulation is not needed here to protect shippers from market power abuse. As subsequently discussed in greater detail, BN and MRL have clearly demonstrated through supporting shipper statements that this transaction will benefit shippers and also promote national rail transportation policy goals by replacing BN's assertedly unresponsive, poor service with that of a new, locally-owned and -operated carrier committed to preserving rail service, jobs, and investment on the southline.

Additionally, we recently reopened *Class Exemption, supra,* to consider the question of whether to exclude large transactions like the one before us from our class exemption rules. In a decision served February 29, 1988, we decided to retain the exemption for all transactions, regardless of size. It is true that we adopted revised rules imposing greater notice and reporting requirements on those transactions leading to the creation of new Class I or Class II railroads. However, the notice and hearing requirements imposed in *this* proceeding were far greater than those imposed by the new revised rules. The information we required from the railroads here greatly exceeded that now required for Class I and II carriers under our revised rules.

Contrary to petitioners' argument, we also find that operations will be essentially the same under MRL as they were under BN. Any operational changes that are likely to occur, suhc as an increase in service, will be of a positive nature. No abandonment of service is proposed and local shippers on the line will continue to receive service similar to the service they received before. Overhead traffic will continue to move over the line, al-

though the creation of MRL has required that interchange points with the BN be established. Those arrangements are customary in any line sale. No shipper of overhead traffic has protested the sale.

Although the potential for abandonment is sometimes a factor in transfers of this type, that is not a prerequisite for filing under our class exemption rules. BN testified that it was considering abandoning the branch lines in the near future and that the main line could be vulnerable to abandonment over the long term. Indeed, the subject southline runs parallel to another BN main line running east-west through the State of Montana. Furthermore, the southline is subject to intense truck competition over the interstate highway system that parallels the southline even more closely.

The record certainly does not support petitioners' claim that the State of Montana has not had enough direct involvement in this particular transaction. Although BN and MRL may not have provided all of the information sought by MPSC at an early date, the carriers have since remedied that through their attendance at various hearings and meetings and through responses to MPSC questions and interrogatories. MPSC participated in our Missoula public hearing, was given access to unredacted versions of the pertinent agreements in this matter, and was authorized to, and did, conduct extensive discovery regarding the subject transaction. We believe that all parties to this proceeding have had an ample opportunity to obtain information about this transaction necessary to the presentation of their positions, and there has been now showing that the after-the-fact remedy of revocation may not satisfactorily protect all interested persons. *See P&LE Railco, supra.*

We also reject petitioners' contention that 49 U.S.C. 10505 does not authorize exemptions for an entire class of transactions. That section clearly allows the Commission to exempt "transactions." In *Class Exemption,* we found that the findings needed to grant an exemption under section 10505 could be made on a class basis for substantially all acquisitions and operations normally governed by section 10901, thus providing a sufficient basis for a class exemption approach to these types of transactions. Our exemption rules have been upheld on judicial review. *See Illinois Commerce Comm'n, supra,* and *State of West Virginia, Ex Rel. A. James Manchin, Treasurer of State* v. *ICC and USA* (D.C. Cir., No. 87-1244), decided March 22, 1988.

We also find no support for petitioners' claim that MRL should have lost its noncarrier status upon purchase of one of these non-contiguous lines so as to make the purchase of the other line subject to 49 U.S.C. 11343 rather than subject to our class exemption procedures. MRL simultaneously acquired all of the lines at issue, through sale or lease, as part of a single transaction and that transaction was properly the subject of our class exemption. There is no proscription in either the statute or our rules limiting the applicability of the exemption to the acquisition of a single, contiguous line of railroad. We have already determined that the exemption may apply to a noncarrier simultaneously acquiring commonly-controlled, non-contiguous lines such as here. *See, e.g., MidSouth, supra.*

Finally, the evidence before us does not indicate that MRL was a carrier when it filed its exemption notice because its owners allegedly had controlling interests in other carriers. MRL has explained that neither Wertheim nor WERCO has a controlling interest in either it or MidSouth Rail, and there is no evidence suggesting

that Dennis Washington, MRL's primary stockholder, controlled any carrier at the time MRL filed its notice. Consequently, we find that MRL was, in fact, a non-carrier for purposes of acquiring these lines under our class exemption procedures. Thus, we conclude that the subject transaction was appropriate for treatment under our class exemption rules.

2. *Viability.* Petitioners question MRL's viability to acquire and adequately operate these rail lines. However, they have failed to support their concerns or otherwise demonstrate that MRL will not be a viable carrier.

At the outset we note that, in promulgating these exemption rules, we specifically rejected a requirement for the submission of detailed financial and operating data. *See Class Exemption, supra,* at page 817. Nevertheless, MRL has provided substantial information about its owners, funding, insurance, personnel, and safety program. MRL has also explained how it will obtain locomotives and rolling stock, and has indicated that BN will guarantee it a minimum level of revenues.

We reject petitioner MPSC's claim that MRL will be "financially captive" to BN so as to jeopardize the former's viability. BN will, by agreement, receive certain rental payments from MRL based on the latter's traffic levels and BN owns and operates a route competitive with the southline. It is also true that BN has certain controls over MRL's interlining with other carriers as discussed below. However, the evidence before us is simply unpersuasive that this would prevent MRL from achieving and maintaining viability. We believe that it will be in BN's self-interest for MRL to be a profitable, financially healthy carrier, since BN will share in MRL's profits under certain circumstances, and because BN will rely upon MRL to make lease payments and to

continue to be a connecting carrier generating substantial amounts of traffic to move over its system. This is further evidenced by certain agreement provisions that contribute greatly toward MRL's financial stability, such as the guaranteed annual income provision. MRL is also able under the agreement to minimize its initial debt burden by leasing rather than purchasing most of the properties, thus assisting in its financial security.

In addition to $5 million in common equity, MRL has strong, independent financial backing. The fact that a commercial bank group with presumably cautious authorization committees has seen fit to lend MRL $30 million, most of which must be paid back from cash flows over a long period of time (8 years), is further evidence of MRL's financial strength. We also place some reliance on the self-interest of an acquiring carrier and its lenders to ensure that the sale/lease agreements they enter into are adequately compensatory. Under the Staggers Act, Congress admonished us to favor market solutions rather than regulatory intervention to create and maintain an efficient rail system, unless it is shown that regulation of a particular service or transaction is necessary to achieve the goals of the national transportation policy. No such showing has been made here. Unless shown to the contrary, we assume here that the profit motives of MRL and its lenders are equal to those of BN. The occasionally flawed deal – in the rail and any other industry – underscores the difficulty of guaranteeing future viability. Thus, while no one can guarantee MRL's health, all indicia are favorable.

As further indicia of viability, we note that MRL has obtained a total of $55 million in commercial liability and property damage insurance. The evidence indicates that MRL has acquired 52 locomotives and 560 freight cars from BN, and that it will have access to additional

amounts of equipment if necessary. Additionally, affected shippers and businesses, which overwhelmingly support this sale, have not questioned MRL's viability, and generally believe that MRL will be able to offer them dependable, competitive service at reasonable rates. Furthermore, MRL has been established and is being operated by an experienced rail management and work force comprised, in large part, of former BN employees. We also believe that MRL's efforts in the safety area, such as assembling an expert safety team and implementing safety procedures in addition to those adopted from BN, establish that public safety will be stressed in its operations and further demonstrates that MRL's operation will be viable. Finally, the fact that MRL has already acquired these lines and has been successfully operating them since October 31, 1987 is, in and of itself, strong evidence of its viability.

In sum, we conclude that MRL will have the financial resources, expertise, personnel, and equipment necessary to provide safe, adequate, efficient, and continuous service to the public. Consequently, we conclude that it will be a viable carrier.

3. **Competition.** Petitioners contend that this transaction must result in increased competition in order to qualify for, or avoid revocation of, this exemption. They argue that, not only will the transaction not result in increased competition here, it actually will have an anticompetitive impact by eliminating or restricting MRL's access to carriers other than BN at gateways on the transferred lines, and by reducing shipper routing and carrier alternatives. MRL and BN respond that, at the very least, the transaction will maintain the *status quo*. They argue further that the transfer will, in fact, promote competition as well as numerous other rail transportation policy goals.

Contrary to petitioners' allegations, our class exemption rules do not require MRL to establish that this transaction will result in increased competition. Petitioners are in error in contending that a transaction cannot qualify for this exemption unless it will actually increase the level of competition existing prior to the sale, or, stated differently for the circumstances here, that BN's competitors must be placed in a better competitive posture (even at BN's expense) than they were in prior to the transfer. Or concern is with the competitive aspects flowing from the transaction itself. In *Class Exemption* at page 817, we stated:

> We further find that these transactions will not result in an abuse of market power. Proposals under this class exemption generally will maintain the *status quo* and will not change the competitive situation.

The transaction here, at a minimum, falls within that category.

We also reject MPSC's claim that this transfer will be anticompetitive in that it will actually reduce competition and increase BN's market power in Montana. BN's transfer of these lines that it formerly owned and operated to a new, separate, independent carrier will not result in more control or any new power by BN over transportation involving those lines. Under the parties' agreements BN has retained certain rate and routing control over MRL. Prior to the transfer, as owner, BN exercised total control over rates and routes on the southline, including the power to discourage shippers from interlining at various BN-controlled gateways. Consequently, BN's control over this traffic after the transfer, even if MRL were totally precluded from offering competitive options to its shippers vis-a-vis the

BN, would not lead to the conclusion that competition would be reduced. There is no new condition imposed upon the traffic by this transaction that would cause a shipper to pay rates exceeding the levels it would have otherwise faced with the prior, single carrier. Most importantly, we point out that the overwhelming support for this transfer by area shippers and businesses indicates that they do not subscribe to MPSC's view that their transportation options will actually be decreased or otherwise harmed by this transaction.

Petitioners argue that BN can control gateways by exacting added revenues from MRL. Again, we note that BN's control over MRL interline traffic subject to such charges is no greater, and cannot be greater, than when BN was the sole carrier. It is possible, of course, that BN's control over those gateways may discourage MRL from offering any new routing options to some of its shippers. If so, competition may not be increased, but it will not be reduced either. The evidence supports the railroads' assertion that such charges, as well as the trackage rights grant and other agreement provisions and restrictions, are designed solely to obtain the expected result that BN retains traffic that moved on its system either to or from the subject tracks prior to the transaction. We believe, further, that restrictions on MRL will not be all encompassing because it will remain in both BN's and MRL's interests for MRL to be able to solicit new traffic at rates that are at least marginally profitable for MRL.

As previously set forth, MPSC has pointed out that some pre-existing interline traffic will be subjected to the supplemental charges under the explicit terms of the agreements. However, BN and MRL have acknowledged this and stated that they did not intend for any such traffic to be subject to supplemental

charges, and that BN will not impose the charge on MRL for those or similar movements. The carriers state further that they will amend their agreement to rectify the situation.

As stated above, BGT has complained about what it claims to be improper BN rate actions. We stated in our decision served December 21st that such claims should be presented in a formal complaint proceeding rather than in a revocation proceeding. BGT has provided no evidence since that time that would warrant a change in our position. Consequently, we will not discuss the matter further, except to take issue with BGT's assertion that the sale somehow resulted in increased BN rate power over BGT. The fact that BN could and did raise BGT's rates before the actual transfer only confirms that BN had the power to do so completely independent of this transaction. The sale therefore did not result in any additional BN ratemaking power.

Rather than being anticompetitive, we conclude that this transaction will likely promote competition, as well as various other rail transportation policy goals. As we have stated in the past, it has been our experience with transaction of this type that the acquiring firm will bring new vitality to the line. Typically, the new operator has closer ties to local communities and will provide better service, often at lower rates, and will work closely with shippers on the line. *See, e.g.*, Finance Docket No. 31094, *Grainbelt Corporation–Acquisition and Operation Exemption–Burlington Northern Railroad Company* (not printed), served September 17, 1987 (*Grainbelt*). The record here establishes that these findings apply to this transaction as well. We conclude that MRL's new operation, individually and in conjunction with BN, will result in an additional competitor for both rail and truck traffic in Montana. Moreover, in

MRL, shippers will have access to a locally-based carrier which, because of lower costs, more flexible work rules, and aggressive local marketing efforts, will be able to offer them more frequent, efficient, and responsive service. In addition, although the parties' agreement requires MRL to pass on to BN some of the savings generated by MRL's lower cost operation, MRL may be able to offer lower rates to shippers than those previously available from BN.

We also believe that this exemption will foster other rail transportation policy goals by minimizing the need for Federal regulatory control, expediting decisions when regulation is not necessary, and reducing regulatory barriers to entry. As with similar transactions under the class exemption, this exemption can also be expected to help ensure the development of a sound rail transportation system, foster sound economic conditions in transportation, and encourage efficient rail management. No other 49 U.S.C. 10101a goal will be adversely affected, although the transaction may be "neutral" on some of the goals (*e.g.*, energy conservation).

On the other hand, revocation of this exemption and possible divestiture may result in these lines returning to a carrier that can no longer efficiently provide service, one that has threatened to abandon the marginal branch lines, and one whose allegedly poor service record and alleged lack of interest has resulted in area shippers and businesses characterizing it as a "bad neighbor." Revocation would also likely harm MRL financially and result in a loss of jobs for its employess.

Finally, because we have determined that this transaction will not reduce competition, there is no need for us to impose any restrictions or conditions here. Consequently, we will not do so.

4. *Labor issues.* Labor interests argue that affected employees have intentionally been kept in the dark by BN and MRL as to the impact this transaction will have on them and therefore the exemption should be revoked and the transaction subjected to individualized review. It appears that MRL and BN initially made little effort to inform employees of the potential impact of the transaction. They stated that they did so because they did not want to provide partial information at a time when firm plans, options, and opportunities had not been formulated. However, MRL and BN officials subsequently have held various meetings with affected employees to provide information and answers to their concerns. Additionally, labor interests connected with petitioners in this proceeding were subsequently given access to redacted versions of all relevant agreements concluded between BN and MRL, and they were given the opportunity to participate in the public hearing held in this matter. We therefore conclude that affected employees have been adequately informed regarding relevant details of this transfer and its potential impact on them.

We reject the CATSS/RLEA argument that we were required to conduct an investigation and hold a hearing in this matter before determining whether or not to impose employee protection. Our authority to make such a determination in exemption cases without a hearing or investigation was clearly established in *Class Exemption,* and affirmed in *Illinois Commerce Comm'n.*[26] As discussed, *infra,* this transaction was properly the subject of those exemption procedures. Additionally, we re-

[26] Nevertheless, we did hold a public hearing in this matter where a number of persons addressed labor issues and we will consider such testimony in deciding whether labor protection should be imposed at this time.

ject the CATSS/RLEA argument that our grant of this exemption without labor protective conditions violated *RLEA, supra,* because we did so without any substantive discussion. In *RLEA* (pages 240-241), the court clearly upheld our policy of considering the imposition of such conditions after an affected party has filed a revocation petition. Here, we will present a "carefully articulated, reasoned balancing of factors pertinent to the particular acquisition," and, thus, will satisfy the court's requirement that such a discussion be contained either in the order approving the acquisition or in a subsequent revocation decision. Accordingly, we conclude that our handling of this matter fully complies with all applicable statutory, regulatory, and case law requirements.

We have consistently held that the imposition of labor protective conditions is discretionary in transactions under section 10901, and, in the past, we have not imposed these conditions on newly formed carriers in the absence of evidence to justify the need for protection. The burden of new operations is great enough without the additional cost of labor protection. *See Class Exemption, supra.* We have also refused to impose such conditions on the selling carrier for the reason that the potentially large expense of labor protection could, by compelling a larger selling price, indirectly burden the new operator, or discourage the sale of marginal lines, leading to their deterioration and ultimate abandonment. *See Knox and Kane R. Co.–Petition for Exemption,* 366 I.C.C. 439 (1982). We have recently reviewed these policies and affirmed that they continue to be in the public interest. *See* Finance Docket No. 30555, *Northwestern Pacific Acquiring Corporation and Eureka Southern Railroad Company–Exemption from 49 U.S.C. 10901 and 11301* (not printed), served January

8, 1988 (*Eureka Southern*); and Finance Docket No. 31205, *FRVR Corportation–Exemption Acquisition and Operation–Certain Lines of Chicago and North Western Transportation Company–Petition for Clarification* (not printed), served January 29, 1988 (*FRVR Corporation*).

Upon evaluation of this record, we conclude that our general findings concerning the burden of labor protection costs on both the buyer and seller are specifically applicable here. Although labor has not submitted any cost analyses, it is clear based on BN's calculations (the only specific figures submitted) that the imposition of labor conditions would expose the railroads to millions of dollars in liability. The railroads view these costs as so burdensome that they would frustrate this transaction; they have included a provision in their agreement allowing either BN or MRL to walk away from the sale should labor protection be imposed. We agree that the imposition of the labor protection sought would threaten the viability of the transaction and the new operation. Finally, we also note that, if the transaction falls through, numerous employees in the near future may be deprived of continued employment on the southline if BN can no longer efficiently and economically operate the line. It is our view that the transaction provides for more economical operation, thereby greatly increasing the prospect that the line will continue to provide viable and competitive service in the future, thus preserving employment.

As we explained in our decision in *FRVR Corporation,* the trend towards the formation of new shortline and regional carriers developed in response to the new competitive environment created by the Staggers Rail Act of 1980. Since partial deregulation under the Staggers Act, nearly 200 shortline and regional railroads

have come into existence. These new entrants operate approximately 13 thousand miles of rail lines with 4 thousand workers handling in excess of 1.3 million carloads annually. This has reversed in part the industry's long trend of exit and contraction that had resulted from the use of the abandonment procedures by large Class I railroads as a means of exit from unprofitable markets. Unlike large Class I carriers, these smaller, more efficient local carriers are able to operate profitably serving these markets. In providing this service, these new entrants preserve rail service for the local economies and provide traffic feeds for the large carriers, leading to enhanced employment prospects for rail labor both on the smaller lines and throughout a reinvigorated Class I system.

In 1982 the Commission gave impetus to this trend by adopting a new labor protection policy. Previously, the typical sale resulting in a new shortline carrier might have been conditioned on comprehensive (and potentially quite expensive) labor protection. However, the Commission came to recognize that the expense of labor protection foreclosed shortline development, forcing less attractive alternatives such as immediate abandonment or reduction in service and maintenance often times eventually leading to abandonment. Since the imposition of labor protection in shortline sales to new entrants is entirely discretionary, the Commission began to withhold protection in individual applications. After consideration of scores of individual applications, the Commission decided in a 1986 notice and comment rulemaking in *Class Exemption, supra,* that the development of new small rail carriers was overwhelmingly beneficial and should be encouraged and allowed to proceed with a minimum of regulatory cost and delay. The Commission therefore issued rules exempting cer-

tain classes of line sales from drawn out Commission regulation, but retaind for itself the unqualified right to review and correct any unique problems that might arise out of exceptional circumstances present in a particular exemption grant. MRL's acquisition falls squarely within these classes of line sales exempted by *Class Exemption, supra,* as we have already discussed.

As also set forth more fully in our decision in *FRVR Corporation,* the Commission's policy has been validated by practical results. New railroad entrants increased, the amount of lines abandoned decreased, service was maintained and typically improved, and rail jobs were preserved that otherwise might have been lost. Under the rules adopted in *Class Exemption* interested persons may oppose individual transactions by filing petitions to revoke the grant of exemption. When petitions to revoke are filed, the Commission evaluates the basis of the revocation request and has the authority to correct any abuses that are shown. The Commission's authority includes the power to impose labor protective conditions through partial revocation. However, this step will be taken under the rules only where exceptional circumstances are demonstrated. The Commission would consider as exceptional situations where there was misuse of the Commission's rules or precedent, or where existing contracts specified that line sales were subject to procedural or substantive protection. Additionally, an exemption will be modified where labor can demonstrate injury that was unique, disproportionate to the gains achieved for the local transport system, and which can be compensated without causing termination or substantially undoing the prospective benefits of the Commission's existing policy for other communities and locales. *See FRVR Corporation, supra,* slip op. at 1-4. We conclude that the various

arguments made here by petitioners do not constitute the kind of exceptional circumstances that warrant revocation of this acquisition exemption and imposition of labor protective conditions.

We are aware that some BN employees may suffer adverse effects from this transaction in terms of layoffs, relocations, or even job losses. The evidence, however, indicates that many will be hired by MRL, over 400 (based on updated information) have already accepted employment and many others will accept BN jobs elsewhere, or will be protected by some form of prior job protection, and/or benefits mitigating such harm.[27]

We recognize that it is a goal of the national rail transportation policy to "encourage fair wages and safe and suitable working conditions in the railroad industry." 49 U.S.C. 10101a(12). However, the evidence before us is simply unconvincing that MRL's wages and benefits will be unfair, or that any new work rules will be unsuitable or will result in safety violations. Although the evidence indicates that MRL wage rates will be lower than BN's, the total compensation package appears to be comparable due to other benefits offered by MRL that are not offered by BN, such as profit-sharing and supple-

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[27] In *Northern Lines* the Commission approved attrition-type, conditions that guaranteed minimum amounts of compensation for those employed at the time of the consolidation that resulted in BN's creation. BN projects that in excess of 56 percent of its current workers on the line are subject to some form of protective conditions (*Northern Lines* protective conditions or others). CATSS/RLEA challenge that figure but have provided figures for only three locals (consisting of 391 total employees) located on the line and their figures are limited to those protected only by the *Northern Lines* conditions. Nevertheless, the CATSS/RLEA figures show that a minimum of approximately 23 percent of the employees are protected, which is still a significant portion.

mental retirement. While there will apparently be some work rule changes under MRL, such changes should lead to operating efficiencies through increased flexibility and therefore be in furtherance of other aspects of the national rail transportation policy. *See* 49 U.S.C. 10101a(3), (4), (5) and (10). Moreover, MRL has reached labor agreements with BLE operating employees and with non-operating employees in seven RLEA member organizations, and it is currently conducting discussions with other unions. MRL appears to have made a good faith effort to hire BN employees to the extent practicable. Although BN has stated that it can no longer efficiently operate this line due to high labor costs and inflexible work rules, we can find no reliable evidence to support petitioners' bare allegation that BN is, by this transfer, attempting to "bust" the unions.

As stated earlier, this transaction may have some adverse impacts on affected employees, but the specific scope of these impacts is unclear. Labor has the burden of proof in this regard. On the other hand, rail labor may benefit overall from additional employment opportunities and profit-sharing to the extent of the new carrier's success. Indeed, by preserving rail service for the local communities and shippers and by being more responsive to their needs due to its more aggressive pursuit of traffic and by providing a traffic feed for BN, MRL should enhance employment prospects for rail labor – both on the smaller lines and throughout a reinvigorated Class I system, which would benefit railway workers in general. *See Grainbelt, supra* (unprinted decision served February 2, 1988), and *FRVR Corporation, supra.* Furthermore, as we pointed out in *Eureka Southern*, the mixed impact on rail labor must be balanced against broader community needs regarding continued rail service. Shippers, businesses, and other com-

munity interests overwhelmingly support this proposal, and we have concluded that this transaction will foster numerous national rail transportation policy goals. On balance, therefore, we conclude that any harm that may befall affected rail workers here will be outweighed by the benefits to shippers, local communities, and the public in general from having available the type of responsive, flexible, and efficient service proposed here by an aggressive locally-based carrier like MRL.

In sum, the opposing labor interests here have failed to demonstrate injury that is unique, disproportionate to the gains achieved for the local transport system, and which can be compensated without causing termination of the transaction or substantially undoing the prospective benefits of the Commission's existing policy for communities and locales.[28] Consequently, they have not advanced any exceptional circumstances that would cause us to revoke the prior exemption and impose costly labor protective conditions or institute an investigate here. *See FRVR Corporation* and *Eureka Southern, supra.* For these reasons, we decline to revoke this exemption or to impose protective conditions sought by labor.

Finally, we agree with BN and MRL that the present precarious condition of the Railroad Retirement System is a matter for Congress, rail management, and rail workers to address rather than this agency. Our concern here is with this transaction.[29]

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[28] Although we earlier rejected BN's $352.5 million labor protection cost figures as excessive (*see* n.23), labor interests have failed to provide any specific figures of their own, so we must assume that the impact will be substantial. Indeed, MRL and BN have specifically included provisions in their agreements to void the transaction should labor protection be imposed.

[29] We also note that several parties have raised the issue of affected employees' eligibility for workmen's compensation. How-

5. *Other issues.* Petitioners have asserted that MRL's operation may be in violation of the commodities clause of 49 U.S.C. 10746, because MRL may be transporting products of an affiliated shipper over the acquired lines. The mere fact that MRL and shipper MRI are commonly controlled by Mr. Washington through majority stock ownership, however, does not make transportation by MRL of MRI's products unlawful under the commodities clause. *See Elgin, supra.* Indeed, MRL has presented evidence to the effect that it and this mining company affiliate will have separate and distinct corporate structures and different shareholders. Conversely, petitioners have otherwise failed to present any evidence suggesting that one company is merely the "alter ego" of the other or that the two companies will be operated with a total disregard for the legal distinctions between them. *See e.g., Lehigh Valley, supra,* and *United States* v. *South Buffalo Ry. Co.,* 333 U.S. 771 (1948). Consequently, we reject petitioners' argument regarding this matter.

We also reject petitioners' contention that BN had no rigth to sell or lease these properties because they are land grant properties that petitioners argue revert back to the United States upon BN's cessation of operations. Petitioners have failed to provide any specific evidence in support of their position other than merely to state that the Northern Pacific Land Grant Act of 1864[30] is the controlling legislation here. This legislation does not appear to provide a bar to this transaction, as the act specifically grants the right-of-way to the "Northern Pacific Railroad Company, its successors and assigns."

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ever, that is strictly a state matter beyond our jurisdiction, and we will therefore not address that issue.

[30] Act of July 2, 1864, Ch. 216, 217, 13 Stat. 365.

Furthermore, we can find no specific reversionary clause in that act. Where a specific reversionary clause is lacking, the courts have construed similar grants as being subject to an implied right of reversion of the land to the United States if it should cease to be used for railroad purposes.[31] Since MRL is continuing to provide rail service over the transferred lines, even an implied condition would not serve as a bar to this transaction. Furthermore, should the land cease to be used for railroad purposes in the future, this transaction will not defeat any right of reversion, implied or otherwise, held by the United States. Thus, this issue is not grounds for revoking this exemption.

In conclusion, we find that petitioners have now shown that regulation of this transaction is necessary to carry out the national rail transportation policy. Consequently, we will deny their revocation petitions. However, under 49 U.S.C. 10505(d), petitions to revoke may be filed at any time.

The historic preservation condition imposed upon MRL in our December 7, 1987 decision remains in effect until completion of the review process mandated by Section 106 of the National Historic Preservation Act.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petitions for revocation and/or rejection are denied.

2. The historic preservation condition previously imposed on MRL prohibiting it from taking any action that may jeopardize the historic integrity of sites and struc-

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[31] *See, e.g., Wyoming* v. *Andrus*, 602 F.2d 1379, 1383 (1979).

tures on the line that are 50 years old or older will remain in effect until the Section 106 review process is completed.

3. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Commissioner Simmons dissented with a separate expression. Commission Lamboley dissented and will submit a separate expression at a later date.

Noreta R. McGee
(SEAL) Secretary

COMMISSIONER SIMMONS, dissenting:

I cannot subscribe to the majority decision which, in my view, endorses a disturbing trend in rail spinoffs. This trend is the increasing prevalence of provisions in sales agreements which seriously hamper the new carrier's ability to compete. The numerous limitations imposed on Montana Rail Link's ability to offer responsive and competitive service should receive the most careful scrutiny by this Commission. This simply has not been done in today's decision.

Especially since passage of the Staggers Act, the ICC has worked to increase the level of competition among rail carriers while maintaining necessary protections for captive shippers. The analysis of competitive issues in the majority's decision is inconsistent with that goal.

APPENDIX

WITNESS STATEMENTS AT ORAL HEARINGS IN ORDER OF APPEARANCE

1. Michael Greely, Montana Attorney General.

   The witness states that MRL must connect with the UP at Butte, MT to offer competition to BN. He asserts that, unless gateways are opened up to other carriers, MRL will be controlled at both ends and in the middle of this line by BN. He wants the Commission to revoke this exemption and thoroughly investigate the transaction.

2. William J. Fogarty, Administrator, Transportation Division, MDOC.

   The witness states that this sale should not be exempt, but that the ICC must investigate the transaction and set appropriate conditions. While he believes the sale may be beneficial, he is concerned about MRL's ability to connect with other carriers at existing gateways controlled by BN.

3. Bob Marks, Montana State Representative.

   The witness wants to give MRL a chance and cites as positive aspects of the sale MRL's profit-sharing plan, local management, and versatile service.

4. Karl Knutsen, General Chairman, Brotherhood of Maintenance of Way Employees, BN System Federation.

   The witness claims that workers fear BN retaliation for speaking here. He also asserts that MRL salaries will be reduced 20-50 percent from BN levels. He claims that BN and MRL are not living up to their labor promises, that most employees

have no labor protection, and that workers and the local economy will be hurt by this sale. He claims that BN wants to rid itself by this sale of a marginally profitable line and reduce labor costs.

5. Mort Lowenthal, a managing director of Wertheim, Schroder & Company.

   The witness states that MRL is viable, citing $5 million in common equity from Dennis Washington and others, $30 million from the Bank of America, and $39 million in commercial liability insurance that is in excess of its $1 million in self-insurance, plus $10 million in property damage insurance. He argues that MRL is not a BN puppet. He claims that MRL will have certain rate-making powers in its relationship with BN, and that MRL's fortunes are tied primarily to its own performance. He states that MRL has eight years in which to repay its loans.

6. Charlies Collins, Attorney.

   The witness claims that shortlines are generally dangerous to employees from a safety standpoint. He is also concerned about a lack of competition.

7. Ray Richter, President, Cascade West Transportation Brokers.

   The witness states that his company has had problems shipping with BN in the past and supports MRL's proposed new service.

8. Bruce Kripin, Montana State Senator.

   The witness believes that this sale will save the southline and, therefore, favors it.

9. Robert Brown, Operations Officer, Washington General Railroad Company.

   The witness asserts that safety is the number one priority on his shortline railroad.

10. Tony Alegria, Traffic Manager, Snowkist Growers.

    The witness states that his company has received more attention and stabilized transportation prices from shortline Washington Central Railroad, and that it has had no problems in getting cars from BN.

11. Nick Temple, Owner and President, Washington Central Railroad Company.

    The witness states that none of his shortline's 35 employees were injured in its first year of operations, in response to Mr. Collins' statements. He claims that his railroad's marketing relationship with BN has been good, as has its employee relations.

12. John T. Greytak, President, BGT.

    The witness claims that his company was unfairly singled out for rate increases by BN. He is concerned about BN's rate and routing control over MRL, and he fears that BGT's business will be diverted to BN's northern line as a result, harming it and MRL. He fears his company will have to turn to truck transportation.

13. Frank B. Morrison, Jr., Attorney.

    The witness does not believe an exemption from public review should have been granted here, and claims that Montana citizens are entitled to know the facts about this sale.

14. Boy Raney, Montana State Representative and conductor.

    The witness objects to the sale because he fears that MRL and Montana will be captive to the BN, and that up to 1,000 jobs will be lost. He says shippers are afraid to object to the sale. He also questions MRL's viability and whether MRL really intends to operate a railroad. He calls for a further review.

15. Bob Bachini, member Montana Legislature and conductor.

    The witness claims that BN has violated its land grant agreements by this sale, and that the land should revert to the U.S. if BN is not going to provide service. He sees no benefits from this sale and calls for a full review. He is also concerned about the impact of this sale on the railroad retirement system.

16. Timothy M. Miller, brakeman.

    The witness claims that this is not a shortline sale, and that he and his family will be harmed by the transfer. He wants more information from BN.

17. Donald Slaybaugh, locomotive engineer and credit union officer.

    The witness is concerned about the impact of this sale on the BN Employees Credit Union at Whitefish, MT. He calls for further review.

18. Paul Fishburn, BN clerk and local TCU chairman.

    The witness asserts that BN is trying to sidestep labor agreements with this sham sale.

19. Fred Brent Noel, BN brakeman.

    The witness complains about BN's secrecy in this matter and lack of notice to employees. He says MRL will have no brakeman.

20. William C. Keppen, Chairman, BLE Committee on the BN.

    The witness is concerned about harm to employees and their families and calls for labor protection.

21. Woody Woodbury, BN dismantle operator.

    The witness claims that BN might sell its North Dakota southline if this transaction goes through.

22. Kathy Noel, wife of Fred Noel.

    The witness asserts that a BN attorney tried to intimidate her and her husband.

23. Mark Southerst, BN attorney.

    The witness claims that he did not try to intimidate anyone, but only wanted to ask Mr. Noel a question.

24. Calvin Burr, engineer and State Chairman, BLE Legislative Board.

    The witness calls for an investigation.

25. Stella Jean Hansen, Montana State Representative.

    The witness questions whether MRL will operate safely. She claims that Dennis Washington's construction company ignored two major safety regulations in building a dam. She wants to know the extent of MRL's insurance coverage.

26. John Hiatt, engineer and Chairman, Safety Committee.

    The witness is concerned that safety will not be a priority with MRL. He fears that employees will not be properly trained in handling hazardous materials. He claims that MRL does not have enough experienced engineers and employees in general. He has "heard about" work-rule violations already.

27. Michael Williams, BN conductor.

    The witness claims that BN is turning its back on its employees and that MRL will only be paying $5.60 an hour.

28. Mitch Royce, BN brakeman.

    The witness contends that MRL would not hire him because he complained too much.

29. James W. Murry, Exec. Secy., Montana AFL-CIO.

    The witness fears that MRL will be captive to BN because shippers will continue to contract with BN. He raises Hepburn Act concerns and worries about the impact of dislocated employees on Montana's social security system. He is also concerned about public safety and questions whether MRL has sufficient resources to indemnify communities against accidents and yet continue to operate the railroad.

30. Gayle Bennett, wife of railroad worker.

    The witness talks about the hardships that a railroad family experiences.

31. Gary Blakely, BN conductor and local UTU officer.

    The witness cites problems getting information from BN and claims that shippers are afraid to testify in opposition. He disputes BN's claim that 56 percent of affected workers have lifetime job protection and argues that the actual figure is only about one-third. He also disputes BN's figures as to the total number of affected workers and claims that BN's labor protection cost figures are excessive. Mr. Blakely argues that employee protection should be mandated here as a condition of the sale.

32. Robert Graftt, General Chairman, UTU, Yardmaster's Dept. and National Executive Board member.

    The witness calls for job protection for all affected employees. He claims BN will not meet with him as agreed.

33. Sherry Parker, wife of railroad employee.

    The witness discusses her husband's problems resulting from this sale. She says he fears job retaliation if she speaks here.

34. John Post, Chairman, UTU Local 685, a BN trainman, and a CATSS member.

    The witness discusses problems with getting information from BN. He argues that labor protection is needed here. He claims that MRL pay, benefits, and work rules will be worse than BN's. He asserts that the use of inexperienced workers is inviting accidents.

35. Fred Thomas, House of Representatives, Montana District 62.

    The witness is in favor of the sale and asserts that BN has been a bad neighbor.

36. Patrick Clevenger, Stone Container Corp.

    The witness wants the ICC to allow this class exemption. he believes MRL is viable. However, he favors conditions on the sale to prevent any anticompetitive aspects that may be found.

37. Terry Murphy, President, Montana Farmers Union.

    The witness does not oppose shortline railroads, including this one. His organization needs continued, dependable, scheduled service. He is concerned about MRL's ability to set rates and its competitive access.

38. John Robbins, local representative, TCU.

    The witness calls for labor protection. He arges that this is not a normal shortline sale as there is no threat of abandonment and the line has high traffic density.

39. John Wlodarski, local Chairman, UTU, representing conductors.

    The witness wants the ICC to revoke this exemption, hold hearings, conduct a full review, and order employee protection.

40. George J. Merseal, BN crane operator.

    The witness talks about his problems stemming from this sale, which he wants the ICC to overturn. He is concerned about the railroad retirement system.

41. Fran Marceau, local Chairman, UTU.

    The witness calls for job protection and claims that BN and MRL have deceived employees. She believes these land grant properties should revert back to the United States if they are sold to a private individual.

42. Richard Van Aken, BN railway clerk and TCU Lodge 43 legislative representative.

    The witness complains about a BN/MRL disinformation campaign.

43. Joe Brand, Montana State Director UTU, a Montana legislator, and a former railroad employee.

    The witness claims that the parties are trying to avoid job protection here, and that they are skirting the law by leasing property instead of selling it.

44. Forrest H. Boles, President, Montana Chamber of Commerce.

    The witness supports the sale. He claims that it makes sense because MRL will provide vigorous new ownership and management. He is concerned about BN's ability to provide capital to operate the southline.

45. Carlo Cieri, Livingston, MT resident.

    The witness states that he is in favor of the sale. He claims that MRL will reopen repair shops.

46. Rick Loftice, Livingston, MT resident.

    The witness says MRL deserves a chance despite the disruptions created by the sale. He believes that a sale is preferable to BN shutting down or abandoning this line.

47. Bruce Erikson, President, Livingston First Security Bank and Guarantee Development Co.

    The witness supports the acquisition and states that Livingston needs MRL to invest in Montana.

48. Hope Roszell, CPA for Brand S Lumber Co., Livingston, Mt.

    The witness favors the sale. She is concerned about higher freight rates via truck and a loss of business if rail service is interrupted. She states that MRL's rates will be lower than BN's.

49. Bob Gersack, President, First National Bank in Livingston.

    The witness likes the idea of MRL's localized management and control. He sees the disclosure problem as a non-issue, claiming that the information withheld by the parties is justified. He acknowledges that the short-term impact may be a little painful.

50. Bob Russell, President, Darby Lumber, Darby, MT.

    The witness says his business is on a branch line that BN had proposed abandoning in the past. He favors the sale as he believes MRL will maintain the branch lines and increase traffic over them. He states that MRL may haul logs to his facility and will dispose of its byproducts; BN would not.

51. Gary Langley, Exec. Dir., Montana Mining Assn.

    The witness says that acquisition will significantly benefit its member companies and area communities. He sees more competitive, dependable, frequent service resulting from the sale.

52. Michael E. Zimmerman, President, Butte Chamber of Commerce.

    The witness believes that MRL can have some success in making the southern line profitable. He is concerned, however, that MRL has not been given the opportunity to purchase the section of line from Helena to Carrison.

53. Russel J. Ritter, Mayor of Helena.

    The witness supports the sale and believes that MRL will be able to offer affordable rail service.

54. Richard C. McDowell, locomotive engineer.

    The witness claims that a MRL train left without proper clearance or running orders which could have resulted in an accident. He does not believe that Dennis Washington has sufficient financial resources.

55. James T. Mular, TCU regional legislative director.

    The witness questions MRL's viability. He fears that the ICC will be allowing BN to abandon branch lines here without any federal scrutiny, and that MRL, will in fact, abandon them.

56. David Owen, Missoula Chamber of Commerce.

    The witness discusses various gains this sale may represent. He realizes that some unpleasant pains will accompany it, but likes the increased local control.

57. Donald Allen, Exec, Dir., Montana Wood Products Assn.

    The witness believes that MRL will offer area mills sufficient equipment and good service at an affordable cost.

58. Tom Staples, President, Montana International Trade Commission.

    The witness favors the sale because of the local management and control, desire, and more frequent, flexible service MRL will offer.

59. Jerry Hall, Tobacco Valley Lumber Company, Kalispell, MT.

    The witness favors this sale and believes MRL will be sensitive to his company's needs.

60. William W. Francis, Vice President, BN, Seattle Region.

    The witness says MRL will offer more flexibility and service than BN. He states that BN has retained control over certain trackage to protect its existing traffic base and its ability to interchange. He argues that BN is not required by this sale to put its traffic base in jeopardy vis-a-vis UP and other carriers. He claims that MRL is viable.

61. Fred Simpson, Exec. Vice President, MRL.

    The witness discusses the BN/MRL ratemaking and marketing relationship as well as MRL's market development and branch line plans.

62. William C. Sheak, BN Director Employee Relations, Seattle Region.

    The witness states that 594 of 1,107 affected employees (54 percent) have Northern Lines merger protection or some form of negotiated protection, including wage guarantees, moving benefits, and seniority retention. He discusses BN severance payments and leaves of absence.

63. Pat Holland, Vice President, Holland Motor Company and Holland Construction.

The witness favors the sale. He anticipates that it will result in additional rail freight volume for his firm, and that it will be positive for his community and Montana.

64. Donald W. Scott, Vice President Marketing, BN.

The witness states that BN is not trying to bust the unions or dispose of assets. He claims, however, that BN cannot compete here because of labor inflexibility and high labor costs, and that this deal will fall through if labor protection is imposed. He is concerned with employee harm, but asserts, that job protection exists for over half of the workers. Finally, Mr. Scott states that the involved branch lines are candidates for abandonment in the near future and that even the main line may be vulnerable over the long term.

65. R. Richard Carter, BN Vice President, Agricultural Commodities Unit.

The witness argues that BN's rate actions vis-a-vis BGT were fully justified and unconnected to this sale. He says that BN is not trying to divert MRL traffic and that BGT rates are actually lower than they should be.

66. Bill Brodsky, President, MRL.

The witness states that MRL has reached labor agreements with several unions, and that it has already hired 533 of its total of 676 employees (342 from BN). He states that the labor agreements trade off necessary wage reductions and work rule changes for improvements in benefits and quality-of-life provisions. He discusses various hiring

preferences given to BN employees. Mr. Brodsky claims that with better benefits than BN, new MRL employees will earn 85 to 90 percent of their BN salaries. Finally, Mr. Brodsky contends that safety will be stressed and, in support, states that MRL has hired experienced safety personnel and has adopted BN's hazardous materials program while working to develop its own.

67. Howard Ellis, MPSC Commissioner.

The witness is concerned about MRL's competitive access and fears that it will be a captive carrier to BN. He is also concerned about the lack of information given affected employees and the harm to them. He calls for revocation, investigation, and hearing.

68. Wayne Budt, Administrator, Transportation Division, MPSC.

The witness argues that MRL will not compete with BN, but only with long-haul truckers. He fears that guaranteed bridge revenues will be insufficient to maintain MRL's operations. He claims that, by adjusting joint BN/MRL rates, BN could eliminate any MRL rate reductions and siphon its revenues.

69. Gene A. Radermacher, principal owner, Radermacher and Associates.

The witness' consulting firm represents BGT. He claims that BGT needs protective conditions on its rates if the company has no other service alternatives.

APPENDIX E

INTERSTATE COMMERCE COMMISSION REPORTS

EX PARTE NO. 392 (Sub-No. 1)

CLASS EXEMPTION FOR THE ACQUISITION AND OPERATION OF RAIL LINES UNDER 49 U.S.C. 10901

Decided December 19, 1985

The Commission adopts final rules exempting from regulation all acquisitions and operations under 49 U.S.C. 10901, except where a class I railroad abandons a line and another class I railroad then acquires the line where the transaction results in a major market extension.

DECISION

BY THE COMMISSION:

On August 28, 1985, we published a Notice of Proposed Rules (NPR) (50 F.R. 34880) to exempt from regulation acquisitions and operations[1] under 49 U.S.C. 10901.[2] Noncarriers require Commission approval under section 10901 to acquire or operate a rail line in interstate commerce. Existing carriers require approval under section 10901 to acquire or operate a line owned by a noncarrier and to acquire and operate previously abandoned lines of an existing carrier.[3] *Applica-*

[1] The terms "acquire" and "operate" include interests in railroad lines of a lesser extent than fee simple ownership, such as a lease or a right to operate.

[2] This proposal does not include railroad construction, which is also governed by section 10901.

[3] Acquisition of an active rail line where both buyer and seller are carriers is governed by 49 U.S.C. 11343.

tion Proc.–Construct., Acq. or Oper. R. Lines, 365 I.C.C. 516, 518 (1982) (*Application Proc.*), and 49 CFR 1150.1. Section 10901 also governs a change in operators. The regulations governing section 10901 transactions are set forth at 49 CFR 1150.

The NPR expanded a proposal filed by Anacostia & Pacific Corp. (APC) seeking exemption for noncarrier acquisitions and operations, where the noncarrier would be a class III carrier after completion of the transaction. With one exception, the NPR proposed to exempt from regulation all acquisitions and operations under 49 U.S.C 10901, including: (1) acquisition of trackage rights governed by 10901; (2) acquisition by a noncarrier of rail property that would be operated by a third party; (3) operation by a new carrier of rail property acquired by a third party; and (4) a change in operators on the line. The exemption would not apply when another class I railroad abandons a line and a class I railroad then acquires the line in a transaction that would result in a major market extension as defined at 49 CFR 1180.3(c).

The NPR proposed to amend the regulations at 49 CFR 1150 by adding Subpart D, *Exempt Transactions.* The proposed regulations required the filing of a notice of exemption that would be effective 7 days after it is filed. The Commission would publish the notice in the Federal Register within 30 days of the filing. The NPR states that the exemption would be revoked if the notice contained false or misleading information.

We noted in the NPR that in recent years most requests for authority under section 10901 have been exemptions rather than applications, and that virtually all of the exemption requests have been granted. We concluded tentatively that a case-by-case handling of these exemptions involved a burdensome and unnecessary ex-

penditure of resources both by individual petitioners and by the Commission. We invited comments on both APC's exemption request and the expanded exemption proposal.

Twenty-two comments were filed,[4] the overwhelming majority in support, because those parties concluded that the exemption would expedite and reduce the costs of entry, help maintain service, and eliminate any uncertainty in negotiations with potential purchasers, especially those unfamiliar with the regulatory process. Some State agencies request that they be served with a copy of the notice, and argue that there be a longer comment period and that more financial and operational information should be filed. The opposing unions argue that this exemption is a drastic change in railroad regulation without adequate support in the record. They also argue that the Commission should impose employee protective conditions.

As discussed below, we will adopt the proposal. The new rules are set forth in the appendix.

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[4] Comments were filed by: Association of American Railroads; Southern Pacific Transportation Company and St. Louis Southwestern Railway Company; Tuscola & Saginaw Bay Railway Company, Inc.; Railtex Inc.; Indiana Hi-Rail Corporation; Rail Management and Consulting Corporation; Illinois Central Gulf Railroad Company; L. B. Foster Company; Jackson & Jessup; Iowa Northern Railway Company; Consolidated Rail Corporation; American Short Line Railroad Association; New York Department of Transportation; Michigan Department of Transportation; Pinsly Railroads; General Electric Credit Corporation; Railway Labor Executives' Association; Board of Trade of the City of Chicago; Illinois Department of Transportation; Alabama Public Service Commission; Illinois Commerce Commission; and United Transportation Union.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10505, the Commission must exempt transactions when regulation is unnecessary to implement the rail transportation policy and the matter is of limited scope or will not result in an abuse of market power.[5] Congress clearly intended that we grant exemptions and rely on "after the fact" remedies, including revocation,[6] to correct any abuses of market power. The fundamental purpose of the exemption process was to allow the Commission to grant exemptions from those requirements of the Act where deregulation would be consistent with the policies of Congress.[7]

The use of exemption here fulfills this legislative directive. This class exemption is designed to merely codify existing practice: exemption is presently the standard method used to acquire Commission approval for acquisitions and operations. It is designed to meet the need for expeditious handling of a large number of requests that are rarely opposed. In most instances, the transactions under this proposal will involve resumed or continued rail service with no change in operations. This exemption is designed to reduce regulatory delay and costs.

Several protestants argue that the findings needed to grant an exemption under section 10505 cannot be made for *all,* or substantially all, acquisitions and operations normally governed by section 10901. They cite two cases to support this proposition, citing Finance Docket No. 30663, *Chicago Cen. & P.R.R. Co.–Purchase (Por-*

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[5] For a discussion of the legislative history of the Commission's exemptive power, see *Simmons v. ICC,* 697 F.2d 326, 334-342 (D.C. Cir. 1982).

[6] H.R. Rept. 1430, 96th Cong., 2d sess. 105 (1980).

[7] *Id.*

tion)–Exemption–I.C.G. R.R. Co., (Gulf) (not printed), served January 2, 1985. However, in *Gulf* and *Chicago* the Commission made the required findings and granted an exemption. The Commission has yet to decide a single case involving the type of limited transactoins included here, in which it could not make the required findings. However, the fact that in the future there may be a few proposals out of hundreds that require an investigation does not preclude us from concluding that regulation of *substantially all* of these tansactions is not necessary to carry out the national rail transportation policy. This conclusion is completely consistent with the legislative directive concerning the Commission's exemption power.

Under the new rule, class exemptions may still be reviewed by the Commission. Any affected party can file a petition to revoke under section 10505(d) and attempt to show that regulation is necessary to carry out the rail transportation policy. In light of the explicit legisiative directive to grant exemptions and then rely on after-the-fact remedies, including revocation, the potential for total or partial reimposition of regulation is always present. Accordingly, we reject protestants' argument that an after-the-fact remedy is not satisfactory. Transactions under this class exemption involve the transfer of discrete, defined property that would not be "lost" in the property of the acquirer. Thus, any transaction could be reversed in whole or in part, and we specifically reserve the right to require divestiture to avoid abuses of market power resulting from the transaction, or to regulate in accord with the provisions of the rail transportation policy.

Some protestants fear that this proposal will be used by class I railroads to divest themselves of marginally profitable lines. They are concerned that this will result

in a transfer of ownership to a party who is not financially viable or lead to inferior service. The three cases cited to support this concern involved purchases of lines that were being abandoned.[8] In these cases, if it were not for the operations by the shortline, rail service would have ended at an earlier date, and there was no negative impact on service to the public as a result of the transactions. Additionally, insolvency by three small railroads attempting to improve unprofitable lines of class I railroads that were to be abandoned is not indicative of the financial stability of numerous other shortlines.

Commentors' concerns about the financial viability of new carriers are not supported by any specific evidence. Illinois Department of Transportation states that its records show that the Commission has approved 10 exemption petitions in Illinois. Six have resulted in apparently viable operations; the two carriers that failed (Prairie Trunk and Prairie Central) acquired lines that were being abandoned; and two did not consumate the transactions. While some new operators may, of course, not succeed in revitalizing unprofitable or marginal lines, we are not aware of many that have failed.

Moreover, we do not agree that the transfer of an active rail line under this exemption would result in a "de facto" abandonment, as argued by some protestants. Transfer of a line to a new carrier that can operate the line more economically or more effectively than the ex-

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[8] *Prairie Trunk Railway–Acquisition and Operation*, 348 I.C.C. 832 (1977); Finance Docket No. 30039, *Prairie Central Railway Company–Abandonment Exemption–Between Paris and Mt. Carmel, IL* (not printed), served October 27, 1982; and Finance Docket No. 29158, *Seattle North Coast Railroad Company–Acquisition and Operation of a Line of Railroad in the State of Washington* (not printed), served March 26, 1981.

isting carrier serves shipper and community interests by continuing rail service, and allows the selling railroad to eliminate lines it cannot operate economically. Transfer before a financial crisis (with attendant plans for abandonment) helps assure continued viable service.

Finally, we note that shortlines are dependent on local traffic for their survival, and thus have a greater incentive than class I carriers to provide local shippers with service tailored to their needs. Notably, no shipper opposes this class exemption. Shortlines frequently are able to reduce operating costs and thus keep rates competitive. No evidence was submitted to refute the tentative conclusion in the NPR at page 4 that:

> The transfer of abandoned or underused rail property for more efficient use by a railroad can be beneficial to the shippers on the line, to the community that the line runs through, and to the selling railroad. When a transfer occurs, shippers receive continued, if not enhanced service, while the selling railroad continues to receive the feeder traffic generated by the line at its junction point with the new operator.

We affirm this conclusion.

The NPR, at page 5, also contained a clear statement that employee protection would not be imposed on this class of transactions:

> We have consistently rejected these requests [for labor protection], reaffirming our longstanding, and judicially approved policy of not imposing labor protective conditions on acquisitions and operations under section 10901. We have stated that the policy of supportig continued operation of abandoned lines or abandonable rail lines is so strong that we will not impose labor protection even on es-

> tablished carriers acquiring or operating such lines. See, *e.g., Tennessee Central Ry. Co.–Abandonment,* 334 I.C.C. 235 (1969); and Finance Docket No. 29923, *Acq. of Line of Chicago, R.I. & P. Ry. Co.–Ft. Worth-Dallas, TX* (not printed), served June 3, 1982. It is our established policy that the imposition of labor protective conditions on acquisitions and operations under 10901 could seriously jeopardize the economics of continued rail operations and result in the abandonment of the property with the attendant loss of both service and jobs on the line. [Footnote omitted.] In conclusion, we would not impose protective conditions if an application or individual exemption were filed. We propose to follow that policy should this class exemption be adopted. * * *

The Commission's well established discretion to impose labor protection under 49 U.S.C. 10901 was recently confirmed in *Black v. ICC,* 762 F.2d 106, 111 (D.C. Cir. 1985), citing *Railway Labor Executives' Ass'n* v. *United States,* 697 F.2d 285, 296 (10th Cir. 1983); *Simmons* v. *ICC,* 697 F.2d 326, 340 (D.C. Cir. 1982); and *In re Chicago, Milwaukee, St. P. & P. R.R.,* 658 F.2d 1149, 1169 (7th Cir. 1981), *cert. denied,* 455 U.S. 1000 (1982). The Railway Labor Executives' Association (RLEA) and United Transportation Union (UTU) offer no persuasive argument that employee protection under 10901 is mandatory. Instead, they argue that the Commission cannot exercise its discretion by making a class-wide finding that employee protection will not be imposed. If discretion could not be exercised by a class finding, it would be virtually impossible for an agency to use rulemaking instead of individual adjudication in dealing with a particular category of cases. "[T]he

choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). Accord, *Vermont Yankee Nuclear Power Corp.* v. *National Resources Defense Council,* 435 U.S. 519, 524-525 (1978); *National Small Shipments Traffic Conf.* v. *ICC,* 725 F.2d 1442, 1447-48 (D.C. Cir. 1984).

Exercising our discretion to not impose employee protection on this class of transactions is consistent with congressional intent.[9] In drafting the Staggers Act, Congress chose not to burden certain new operators with labor protection costs. For example, the acquirer of a rail line under 49 U.S.C. 10910, the feeder rail program, can elect to be exempt from nearly all provisions of the Interstate Commerce Act, including the labor protection provisions of 49 U.S.C. 10903.[10]

Additionally, 49 U.S.C. 10905, the provision governing offers of financial assistance, is silent on the issue of employee protection. After an analysis of congressional intent, the Commission exercised its discretion and did not impose employee protection on section 10905 transactions. *Illinois Central Gulf R. Co. – Abandonment,* 366 I.C.C. 911 (1983) affirmed, *Simmons* v. *I.C.C.* 760 F.2d 126 (7th Cir. 1985), *pending cert.*, No. 85-438. We concluded at page 914:

> When this statute [10905] was enacted, Congress stated that one of its goals was to assist shippers who are sincerely interested in improving rail serv-

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[9] The legislative history of the Staggers Act reflects a deliberate congressional option for "discretionary" rather than "mandatory" labor protection in section 10901. H.R. Rept. 1430, *supra,* n. 6, at 115-16.

[10] Discussed in detail in *Simmons* v. *I.C.C., supra,* n. 5, at 341.

> ice. [citation omitted]. [Employee protective] conditions are inconsistent with these goals since they will render acquistion more costly and, therefore, deter efforts which otherwise are to be encouraged. [Footnote omitted.]

Employee protection is also inconsistent with our goals in granting this class exemption and would discourage acquisitions and operations that should be encouraged. The record supports a conclusion that the acquirer would not be able to complete the transaction if those conditions were imposed.[11] RLEA and UTU have not demonstrated a need for employees protection either in past individual exemption requests or in this class exemption. There is no reason to impose the potential expense and burden of employee protection on an acquirer where there is not likely to be a demonstrated need.

To date most exemptions have involved abandoned lines, and employee protective conditions had already been imposed on the abandoning-selling carrier in the abandonment proceeding. In those instances not involving abandoned lines, labor has on occasion requested that conditions be imposed on a selling carrier. Prior to the late 1970's, the Commission did not have a clear policy concerning imposing employee protective conditions on a seller. With the bankruptcy of Chicago, Rock Island and Pacific Railway Company, Debtor (William M. Gibbons, Trustee), (Rock Island) and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor, many shortlines sought to acquire marginal or

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[11] See comments filed by: Pinsly Railroads, Association of American Railroads (AAR) at 12; Indiana Hi-Rail at 3; Rail Tex at 2; Tuscola & Saginaw Bay at 2; and General Electric Credit Corporation at 2.

abandoned lines. Faced with the need to encourage continuation of rail service, the Commission adopted the present policy of not imposing conditions on the buyer or the seller.[12] We reasoned that there are costs associated with labor protection, and these costs would result in an increased selling price. Thus, the acquirer would indirectly bear these costs. In addition, in transactions under section 10901, operations are continuing and jobs for rail employees will continue to be available. Thus, railroads seeking to rid themselves of marginal lines should be encouraged to sell to shippers, shortlines, communities, and other mainline carriers who seek to continue operations over these lines. If labor protective conditions are imposed, the economic justification for transfer of a line is diminished if not negated. Accordingly, for these reasons and the reasons discussed above, no conditions will be imposed as a matter of course on the seller in a proposal using this class exemption.

In view of labor's lack of demonstrated need, the availability of revocation, congressional and Commission policies encouraging continued rail operations, and the likelihood that labor conditions would jeopardize the transaction and the economics of continued operations, we will exercise our discretion and not impose employee protective conditions on this class of transactions.

In an extraordinary case, a protesting labor union may seek protection by way of a petition to revoke under 10505(d). If an exception showing of circumstances justifying the imposition of labor protection is made, the Commission is empowered to revoke the ex-

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[12] See *Knox and Kane R. Co.–Petition for Exemption*, 366 I.C.C. 439, 441-444 (1982); and *Common Carrier Status of States, State Agencies*, 363 I.C.C. 132, 136 (1980).

emption, in whole or in part, and impose labor protection. However, we will respond summarily to unsupported or otherwise *pro forma* requests for labor protection.

Several railroads argue that the Commission's authority to impose labor protection is limited by the plain language of section 10901(e) to situations where a rail "carrier propose[s] both to construct and operate a new railroad line pursuant to this section." [Emphasis added.] In view of our general holding, we need not and will not resolve this here. We note only that, while amendments to the Interstate Commerce Act reflect a disinclination towards routinely–imposed labor protection, our regulatory authority is both express and implied and early cases on the subject find implied authority to impose labor protection. See *United States* v. *Lowden*, 308 U.S. 225, 239-40 (1939).

RLEA and UTU also argue that it is "premature" to adopt an exemption that is at odds with legal arguments made by RLEA and UTU in several cases pending review. However, pending court cases cannot restrict an agency's docket in the manner advocated; settled principles of administrative law preclude that. The Administrative Orders Review Act ("Hobbs Act"), 28 U.S.C. 2342, *et seq.*, confers "exclusive jurisdiction" on a single court of appeals to enjoin or set aside a particular Commission rule or order, 28 U.S.C. 2349, and to stay the agency's order *pendente lite* or permanently. *Id.* That jurisdiction does not extend to other Commission proceedings, even those premised on the validity of an order under judicial challenge. Thus, the Commission is under no legal obligation to stay its present administrative proceeding until various court cases are decided. Additionally, the arguments advanced in the cases cited by RLEA and UTU do not persuade us that the legal

positions adopted in this exemption proceeding are in error.[13]

RLEA and UTU further challenge the inclusion of "incidental trackage rights" in this class exemption. For clarity, we define "incidental trackage rights" as a grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party, that occurs at the time of the acquisition or operation. For the reasons noted above, the pending case cited by RLEA, *RLEA* v. *ICC, et al.*, D.C. Cir., No. 85-1443, does not make our action premature (RLEA has now moved for voluntary dismissal). Recently, in *Black* v. *ICC, supra,* at 110-11, 114-15, the D.C. Circuit reaffirmed two Seventh Circuit decisions that section 11343 governs only transactions between two or more carriers (*In Re Chicago, Milwaukee St. P. & P.R.R., supra,* and *Illinois* v. *United States, supra*). Thus, trackage rights involving only one carrier or an abandoned line are properly included in this class exemption.

A few States are concerned that this proposal will result in a shortened time period for comment before the proposal becomes effective. Generally, exemptions have a 30-day effective date; however, many exemptions include a request for an immediate effective date that is usually granted. Our experience has shown that there is generally strong support for individual exemption requests to be handled expeditiously so that rail service will not be interrupted. It has been our experience that affected shippers and communities *do not seek*

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[13] In the cases cited by RLEA, the challenge centers on the statutory classification of the transactions. RLEA claims that the various transactions should have been processed under section 10903 (abandonments) or section 11343 (consolidations, acquisitions and trackage rights involving more than one carrier).

a longer period for comment, even when the decision is effective immediately. Although the comment period is rarely used to oppose individual exemptions, a few State agencies nevertheless seek to have the proposed rules modified to include a notice and comment period. We conclude that there has been no showing of a benefit from a notice and comment period that outweighs the benefit of expeditious handling. Doing so would be inconsistent with the intent of this class exemption – to streamline current procedures. We note that, as a practical matter, State and local governments receive actual notice well before the proposal is filed. Local interests and government entities are often involved in the early stages of these proposals and frequently provide funding and loan guarantees. Additionally, no notice is given today before an individual exemption request is filed, and experience has shown that no hardship results.

Finally, we will clarify a statement in the NPR that if the notice of exemption contains false or misleading information it will be revoked. Consistent with other class exemptions, if the notice contains false or misleading information it is void *ab initio* [See 49 CFR 1152.50(d)(3)]. Revocation, as discussed above, is a remedy available under 10505(d). These petitions may be filed pursuant to 49 CFR Part 1115 or Part 1117. This minor modification is included in the final rule.

We also clarify that this exemption includes a change in operators, either carrier or noncarrier, if the lease remains a 10901 transaction.

A number of parties suggested that the information required in the notice be broadened to include more detailed financial and operating data. Others request that we require, among other things, negotiation between competing carriers. We have reviewed our experience under the many individual exemptions proceed-

ings we have decided to date. The vast majority of these cases have been processed with far less financial and operating information, to the apparent satisfaction of the affected shipper and carrier parties. Moreover, those directly involved (including the State) are, in fact, well aware of the financial condition of the potential acquirer, expected traffic revenues, volume and commodities, as well as intended operation.

We have considered the proposed rules with these conclusions in mind, and will eliminate proposed rules 1150.33(f) and (h) as unnecessary and potentially misleading. We also do not think it would be productive to impose a negotiation requirement in all cases despite the fact that only the very rare case rises any competitive issues. While we do not minimize these concerns, we believe the revocation procedure is adequate and appropriate to handle the few unique cases, and a petition for stay can also be filed in the exceptional case. We have and will continue to handle these cases expeditiously.

We conclude that exemption of these transactions will foster the rail transportation policy of 49 U.S.C. 10101a by minimizing the need for Federal regulatory control over the rail transportation system, ensuring the development and continuation of a sound rail transportation system, fostering sound economic conditions in transportation, reducing regulatory barriers to entry, and encouraging efficient rail management. Therefore, we find that the continued regulation of acquisitions and operations under 49 U.S.C. 10901 is not necessary to carry out the national rail transportation policy.

We further find that these transactions will not result in an abuse of market power. Proposals under this class exemption generally will maintain the *status quo* and will not change the competitive situation. The vital in-

terests of shippers, communities, and carriers will be served by this exemption because it will result in the continuation of service that might otherwise be lost. Accordingly, we adopt the NPR.

Other exemptions that may be relevant to a proposal under this Subpart are the class exemption for control at 49 CFR 1180.2(d)(1) and (2), and the exemption from securities regulation at 49 CFR 1175.

We find:

1. Regulation of acquisitions and operations of railroads under 49 U.S.C. 10901 is not necessary to carry out the rail transportation policy and is not necessary to protect shippers from the abuse of market power.

2. We affirm the conclusions expressed in the NPR that this action will not have a significant economic impact on a substantial number of small entities, because it imposes no new requirements on them.

3. This action will not significantly affect either the quality of the human environment or energy conservation.

Authority: 49 U.S.C. 10321, 10505, and 10901; and 5 U.S.C. 553.

VICE CHAIRMAN SIMMONS, concurring:

I would have granted the notice requirement proposed by some States. I cannot agree with the majority's conclusion that there has been no showing of a benefit from a notice and comment period. Recently, State Governments have become actively involved in attracting new businesses and helping marginal businesses already there. New railroads may still have to comply with certain State laws or regulations dealing with such matters as incorporation, and some may need help in financing new operations or locating new shippers to their lines. A simple, inexpensive notice provi-

sion directed toward designated State agencies may ease and expedite matters for new and struggling rail operations.

Except for the small disagreement expressed above, I approve this class exemption. As the decision states, it will encourage and enhance several goals for the national rail policy. This exemption is designed to encourage *viable* new class III railroads. In order to make the system work, however, large railroads must help. They must consider the special financial needs of the new short lines and the efficiencies they may produce. To promote the national rail policy and the public interest, large railroads should, when possible, quote and participate in joint rates which provide fair divisions to their new short line connections.

COMMISSIONER LAMBOLEY, concurring in part, dissenting in part:

I believe exemption is appropriate for the class of transactions generally associated with the establishment, or continuation of short line rail service. Such integrated transactions have customarily included proposals for acquisition or substitution, operation, and control combined with incidental trackage rights agreements, as well as necessary financing arrangements. Recognizing the need to facilitate continued, even competitive, rail service, we have in the past customarily granted exemption from relevant statutes on a case-by-case basis to achieve that purpose based on appropriate findings under section 10505.

The class exemption here granted flows from the aggregate of those cases, but should *not* be read to encompass those more expansive situations which are not of limited scope, nor otherwise without concern for poten-

tial market abuse.[14]

Moreover, while exemption is appropriate, I am persuaded by certain comments that it should include service of notice on State authorities together with relevant financial and operational information. Such informational notice would provide knowledge to aid those economically interested in evaluating the impact and viability of the proposed transactions.

Finally, I do not share the majority's analysis of employee protection issues. Although section 10901, employee protective conditions are matters within the Commission's discretion, this exemption fails to either articulate the criteria or identify the circumstances upon which such discretion is exercised in favor of these conditions. Rather, the Commission in essence finds that it has not imposed such conditions in the past, and holds that it anticipates no need to do so in the future, although it does allude to the possibility in an "extraordinary case."

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[14] See, *e.g.*, F.D. No. 30439, *Gulf & Miss. R.R. Corp.–Purchase Exemption I.C.G. R.R.*; (not printed) served January 2, 1985 and F.D. No. 30663 *Chicago Cent. & Pac. R.R. Co.–Purchase Trackage Rights and Securities Exemption* I, (not printed) served September 17, 1985 and II (not printed) served December 24, 1985. In both cases the Commission ultimately granted exemptions. However, it did so in each instance, only after commencing investigation and discovery coupled with the subsequent withdrawal of opposition reflecting negotiated settlement of market issues allowing the Commission to find and conclude that the proposed transactions were essentially free from potential market abuse. Indeed, had those circumstances not occurred, exemption would not have been appropriate in light of fact patterns involving substantial numbers of multi-state rail miles, shippers and employees, all of which removed the cases from being fairly considered as "limited in scope" or easily remedied after-the-fact by revocation of exemption.

Precedent other than that historically recalled in the decision, evidences recent Commission and judicial approval for the imposition of protective conditions in section 10901 cases.[15]

Moreover, this exemption presumes that all relevant transactions fall within section 10901. However, prior cases evidence that section 11343 may apply to aspects of the integrated transactions generally proposed. Thus labor protection is required.[16]

The majority seems to view the labor protection issue only in the context of employees as being represented by a labor organization and an assessment of the cost impact based on negotiated labor agreements.

This exception expressly includes the substitution of one operator for another, which may merely involve the replacement of one short line operation for another, neither of which may necessarily have employees represented by any labor organization or working under a labor agreement.[17] Consequently, assumptions regarding cost impact based solely on collective bargaining agreements are inaccurate.

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[15] See *e.g., Durango & Silverton N.G.R. Co.–Acquisition & Operations,* 363 I.C.C. 292 (1979), affirmed *RLEA* v. *U.S.* F.2d 285 (10th Cir. 1983); *Prairie Truck Railway–Acquisition and Operation,* 348 I.C.C. 832 (1977) affirmed *People of State of Illinois* v. *U.S.,* 604 F.2d 519 (7th Cir. 1979); see also *Cadillac & Lake City Ry. Co.–Acquisition & Operation,* 320 I.C.C. 617 (1964).

[16] See *e.g.,* F.D. No. 30682, *Hammermill Paper Co.–Exemption,* (not printed) served August 21, 1985 and F.D. No. 30657 *Green Hills Rural Development, Inc. & Chillicothe So. Ry. Co., supra.*

[17] See *e.g.,* F.D. No. 30657, *Green Hills Rural Development, Inc. & Chillicothe So. Ry. Co.–Exemption,* (not printed) served January 10, 1986, F.D. No. 30457 *San Diego & Imperial Valley R.R. Co.,* (not printed) served October 7, 1985; F.D. No. 30709, *Canonie Atlantic Co. and Canonie, Inc.–Exemption,* (not printed) served September 11, 1985.

In my view, the decision on the employee protection issue is overbroad and without substantial evidentiary support for this conclusions.[18] The class exemption need not include a blanket prospective finding that employee protective conditions are unnecessary. This approach does little to reduce the prospects of future litigation and jeopardizes the benefits this exemption otherwise seeks to provide by facilitating continued rail transportation service.[19] I would have preferred disposition of this issue on a basis that allows a time limited submission and decision on employee protection prior to the effective date of exemption.[20] This, I believe would avoid the more complex revocation proceedings or problems similar to those experienced in the handling of the *Maryland Midland* case, *supra*, n. 5.

It i ordered:

1. We adopt the Notice of Proposed Rulemaking and amend Part 1150 of the Code of Federal Regulations as set forth in the appendix to this decision.

2. This decision is effective February 17, 1986.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Taylor, Sterrett, Andre, Lamboley, and Strenio. Vice Chairman Simmons con-

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[18] The decision also fails to address remedial procedures and burden of proof in the event revocation is sought in any particular instance to which the class exemption may arguably apply.

[19] See *e.g.*, No. 30237, *Maryland Midland Group, Inc.–Exemption*, (not printed) served September 19, 1983, reopening denied (not printed) served March 14, 1985, review filed May 17, 1985, *UTU* v. *ICC* Case No. 85-1304 (D.C. Cir.), voluntarily reopened by Commission (not printed) served October 3, 1985.

[20] Cf. Motor Carrier Exemption at 49 CFR 1186.1 *et seq.*, codifying Ex Parte No. 55 (Sub-No. 57), *Exemption of Certain Transactions Under 49 U.S.C. 11343*, 133 M.C.C. 449 (1984).

curred with a separate expression. Commissioner Lamboley concurred in part, and dissented in part with a separate expression.

APPENDIX

Title 49, Subtitle B, Chapter X, Part 1150 of the Code of Federal Regulations will be amended as follows:

Subpart D–Exempt Transactions

Sec.

1150.31 Scope of Exemption.
1150.32 Procedures and relevant dates.
1150.33 Information to be contained in notice.
1150.34 Format for caption summary.

Subpart D Exempt Transactions

§ 1150.31 *Scope of exemption.*

Except as indicated below, this exemption applies to all acquisitions and operations under section 10901 (See 1150.1, *supra*). This exemption also includes: (1) acquisition by a noncarrier of rail property that would be operated by a third party; (2) operation by a new carrier of rail property acquired by a third party; (3) a change in operators on the line; and (4) acquisition of incidental trackage rights. Incidental trackage rights include the grant of trackage rights by the seller, or the assignment of trackage rights to operate over a line of a third party that occur at the time of the exempt acquisition or operation. This exemption does not apply when a class I railroad abandons a line and another class I railroad then acquires the line in a proposal that would result in a major market extension as defined at 49 CFR 1180.3(c).

Other exemptions that may be relevant to a proposal under this Subpart are the exemption for control at 49 CFR 1180.2(d)(1) and (2), and the exemption from securities regulation at 49 CFR 1175.

§ 1150.32 *Procedures and relevant dates*

(a) To qualify for this exemption, applicant must file a verified notice providing details about the transaction, and a brief caption summary, conforming to the format in 1150.34, for publication in the Federal Register.

(b) The exemption will be effective 7 days after the notice is filed. The Commission, through the Director of the Office of Proceedings, will publish a notice in the Federal Register within 30 days of the filing. A change in operators would follow the provisions at 49 CFR 1150.34, and notice must be given to shippers.

(c) If the notice contains false or misleading information, the exemption is void ab initio. A petition to revoke under 49 U.S.C. 10505(d) does not automatically stay the exemption.

§ 1150.33 *Information to be contained in notice*

(a) the full name and address of the applicant;

(b) the name, address, and telephone number of the representative of the applicant who should receive correspondence;

(c) a statement that an agreement has been reached or details about when an agreement will be reached;

(d) the operator of the property;

(e) a brief summary of the proposed transaction, including (i) the name and address of the railroad transferring the subject property, (ii) the proposed time schedule for consummation of the transaction, (iii) the mile-posts of the subject property, including any branch lines, and (iv) the total route miles being acquired;

(f) a map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States; and

§ 1150.34 *Caption Summary*

The caption summary must be in the following form. The information symbolized by numbers is identified in the key below:

INTERSTATE COMMERCE COMMISSION

NOTICE OF EXEMPTION

Finance Docket No.

(1)–EXEMPTION (2)–(3)

(1) has filed a notice of exemption to (2)(3)'s line between (4). Comments must be filed with the Commission and served on (5). (6).

The notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

By the Commission, Chairman Gradison, Vice Chairman Simmon, Commissioners Taylor, Sterrett, Andre, Lamboley, and Strenio. Vice Chairman Simmons concurred with a separate expression. Commission Lamboley concurred in part, and dissented in part with a separate expression.

Key to symbols:

(1) Name of entity acquiring or operating the line, or both
(2) The type of transaction, *e.g.*, to acquire, operate, or both.
(3) The transferor.
(4) Describe the line.
(5) Petitioners representative, address, and telephone number.
(6) Cross reference to other class exemptions being used.

APPENDIX F

INTERSTATE COMMERCE COMMISSION

DECISION

FINANCE DOCKET NO. 31205

FRVR CORPORATION – EXEMPTION ACQUISITION AND OPERATION – CERTAIN LINES OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY – PETITION FOR CLARIFICATION

Decided: January 28, 1988
[Service Date: January 29, 1988]

This decision is issued in response to a petition filed by the Chicago and North Western Transportation Company (CNW) and FRVR Corporation. FRVR is a new corporation formed for the purpose of acquiring and operating certain rail lines of the CNW. Petitioners seek a statement of this agency's views as to our jurisdiction over labor issues arising out of the formation of short-line railroads. The matter has become controversial in the past several years, due to the acceleration in the creation of regional and short-line railroads.

Since partial deregulation under the Staggers Rail Act of 1980[1] nearly 200 short-line and regional railroads have come into existence – partially reversing the industry's long trend of exit and contraction. These new roads now operate approximately 13 thousand miles of rail lines with 4 thousand workers handling more than 1.3 million carloads yearly.

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[1] Pub. L. No. 96-448. 94 Stat. 1941-45.

Up until the Staggers Act, the principal means of exit for large "Class I" railroads from unprofitable markets had been through abandonment. Substantial deregulation of motor freight under the 1980 Motor Carrier Act[2] threatened to accelerate this trend through new and increasingly efficient truck competition. Abandonment, by its nature, is most often a painful, disappointing process. It normally entails the permanent loss of jobs and railroad service, even though it has not always occurred in markets that are inherently unserviceable by rail. Markets that produce losses when operated by Class I railroads can produce profits for smaller, more efficient local carriers. These new carriers are potentially beneficial to nearly all concerned. They preserve rail service for the local economies and provide traffic feed for the larger carriers, enhancing employment prospects for rail labor – both on the smaller lines and throughout a reinvigorated Class I system – and they foster optimal recognition of the energy efficiencies and environmental benefits of rail service.[3]

The trend away from abandonment and towards the formation of short-line and regional carriers developed in response to the new business environment created by the Staggers Act. This development was given impetus by a change in 1982 in Commission labor protection policy which was in part based upon a provision of the Staggers Act which establishes a branch line sale process in which labor protection was foreclosed by the the

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[2] Pub. L. No. 96-296, 94 Stat. 793.

[3] The National Rail Transportation Policy charges the Commission with the responsibility of ensuring the development of a sound rail transportation system, while encouraging fair wages and safe and suitable working conditions for labor. The Commission is also to encourage and promote energy conservation. *See* 49 U.S.C. 10101a.

statute.[4] In the past, the typical sale of a short-line carrier might have been conditioned upon comprehensive (and potentially quite expensive) labor protection.[5] By 1982 the Commission had determined that the expense of labor protection foreclosed short-line development, forcing the less attractive abandonment alternative or an abandonment and sale under the provisions of 49 U.S.C. 10905. As labor protection in short-line sales to new entrants is within the Commission's discretion, the Commission began to withhold protection in individual applications[6] on the three-part theory that (1) in doing so rail service would be preserved, (2) the new railroads provided the best prospect for protecting the employment prospects of the affected labor and (3) it made no sense to force railroads to go through the more cumbersome process of abandonment under 49 U.S.C. 10903 and sale under 49 U.S.C. 10905 to achieve the same result. After consideration of scores of individual applications, the Commission decided in a 1986 notice and comment rulemaking that the development of new small railroads was overwhelmingly beneficial and should be encouraged and allowed to proceed with a minimum of regulatory cost and delay.[7] The Commission issued

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[4] 49 U.S.C. 10905. *See Simmons* v. *ICC*, 780 F.2d 126 (7th Cir. 1985).

[5] *See e.g., Durango and Silverton Narrow Gauge Railroad Co.–Acquisition and Operation*, 363 I.C.C. 292 (1979), *aff'd sub nom. Railway Labor Executives' Association* v. *United States*, 697 F.2d 285 (10th Cir. 1983) (Review Board decision noting that imposition of labor protection was discretionary).

[6] *See Knox and Kane Railroad Co.–Gettysburg Railroad Co.–Petition for Exemption*, 366 I.C.C. 439 (1982).

[7] Ex Parte No. 392 (Sub No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, aff'd sub nom. Illinois Commerce Commission* v. *I.C.C.*, 817 F.2d 145 (DC

rules exempting certain classes of line sales from drawn out Commission regulation, retaining for itself the unqualified right to review and correct any unique problems that might arise out of exceptional circumstances.[8]

The Commission's policy has been validated by practical results. New railroad formation quickened,[9] abandonments fell,[10] service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved.[11] Most observers supported and

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Cir. 1987). This decision is in keeping with the National Transportation Policy of minimizing the need for Federal regulation (49 U.S.C. 10101a(2)), as well as the policies noted in footnote 3 above.

[8] The Staggers Act expanded the Commission's exemption authority. Further, as is stated in the Conference Report, the Commission is *actively* to pursue exemptions for transportation and is to have a policy of reviewing carrier actions *after the fact* to correct abuses. *See* H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 104-105.

[9] *New Railroad Formation*

Year Est.	*Number*
1982	25
1983	20
1984	31
1985	28
1986	45
1987*	70

* Preliminary figure based on notices filed.

[10] *Miles of Lines Abandoned*

Year	*Miles*
1982	5151
1983	2454
1984	3083
1985	2343
1986	2087
1987	1932

[11] The Commission's Office of Transportation Analysis is engaged in continuing study and research on the effect of the Com-

welcomed the Commission's policy initiative, but it has been consistently opposed by organized rail labor. Under the rules adopted in 1986, opposition to individual transactions is presented in petitions to revoke the grant of exemption. Such petitions have been filed in approximately 20 of the 120 transactions processed under the 1986 rules. Where petitions to revoke are filed, the Commission evaluates the basis for the revocation request, and has well-defined authority to correct any abuses that are shown.[12] The Commission's authority includes the power to impose labor protective conditions through partial revocation,[13] although under the rules this step will be taken only where exceptional circumstances are shown. The Commission would consider as exceptional, situations in which there was misuse of the Commission's rules or precedent,[14] or where existing contracts specified that line sales were subject to

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mission's policy and the short-line/regional phenomenon. This study has included on-site interviews with labor and management, as well as data collection and analysis. This analysis demonstrates that employment on the new lines, particularly the larger regional carriers, is typically drawn from the work force of the selling carrier. Further, while initial employment levels are below those of the departing carrier, employment on some lines has grown over time as improved service attracts new business to the lines.

[12] *See Consolidated Rail Corporation–Declaratory Order–Exemption,* 1 I.C.C.2d 895 (1986), *cited approvingly, G&T Terminal Packaging Co., Inc.* v. *Consolidated Rail Corp.,* CA 84-1173 Slip op. (D.N.J. October 23, 1986). *See also* legislative history of the Staggers Act in footnote 8 above.

[13] *See Maryland Midland Railway, Inc.–Exemption from 49 U.S.C. 11343 and 11301* (not printed), served January 6, 1987.

[14] *Cf.* Order of Investigation, served May 18, 1987, in F.D. No. 30965, *Delaware and Hudson Railway Company–Lease and Trackage Rights Exemption–Springfield Terminal Railway Company.*

procedural or substantive protection.[15] Further, the exemption will be modified where labor can demonstrate injury that was unique, disproportionate to the gains achieved for the local transport system, and which can be compensated without causing termination of the transaction or substantially undoing the prospective benefits of the Commission's existing policy for other communities and locales.[16]

The exemption proposal filed by CNW and FRVR corresponds quite well to our expectations and experience with the use of the Ex Parte 392 (Sub-No. 1) rules. At issue are 208 miles of light density lines in Eastern Wisconsin in the area between Green Bay and Milwaukee. The paper industry is the principal source of traffic and holds the greatest potential for traffic growth on the FRVR line. But to achieve growth means reversing the paper industry's increasing reliance on truck service. A verified statement filed by Petitioners indicates that rail market share of the outbound paper market was 54 percent of the total in 1977, but had fallen to under 20 percent by 1986. The number of motor carriers operating in the region had doubled and price competition is strenuous. The lines of the CNW may now be under additional pressure since its rail competition (which had been the Soo Line operating at relatively standard Class I costs) is a new regional operator, the Wisconsin Central. Wisconsin Central, as orga-

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[15] It is the Commission's standard labor protection policy in restructuring proceedings to preserve existing employment contracts insofar as possible, consistent with the merger, consolidation or abandonment authorized. *See* section 2 of the standard *New York Dock* conditions, 360 I.C.C. 84 (1979).

[16] *Cf. Northern Pacific Acquiring Corp. and Eureka Southern Railroad Co.–Exemption* F.D. 30555 (Decision served January 8, 1988).

nised, has distinct cost advantages that will make long-term competition by CNW almost certainly impossible, absent a substantial improvement in efficiency and productivity.[17]

To work its way out of this predicament, CNW seeks to sell its line to the newly formed FRVR. FRVR has a management team drawn from the Wisconsin area and from within the rail industry, with experience in running a small railroad and marketing rail transportation to the paper industry. It intends to draw its work force from existing CNW employees where possible, and anticipates that it will operate as a union-represented company.[18] Its wage rates will be approximately 85 percent of the Class I standard, and its work rules will give it substantial productivity improvement over the CNW operations. The company also anticipates use of an incentive bonus plan to further productivity. It will own its own engines, operate its own facilities, and rely principally on the CNW for car supply. It has trackage rights over CNW to connect into Milwaukee, and it has connections with other roads at points on the system. The company has already contacted shippers along the lines, and it filed 25 shipper letters acknowledging anticipated support and cooperation with its petition.

CNW estimates that the impact of the sale on its employees will be minimized by FRVR's commitment to

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[17] Two petitions to revoke the Wisconsin Central exemption (F.D. No. 31102) are now before the Commission.

[18] Verified Statement of S. P. Selby. Selby states that CNW employees currently working on the affected lines are granted right of first hire selected in accordance with qualifications, work records, fitness and ability, and physical and medical standards. Selby states further that he has met with an officer of the Railway Labor Executive's Association to work out a suitable arrangement for union representation of future employees. V.S., at 3-4.

the use of former CNW employees. For its part, CNW states that it has employment shortages elsewhere on its system, and that it will make these jobs available to workers affected by the FRVR sale. It anticipates that approximately 20 employees might still be left without employment either on FRVR or the CNW. It has offered a commitment of $30,000 per employee as a separation allowance for any employee unable to secure continued employment with either CNW, by exercising seniority, or with FRVR, under the right of first hire.[19] CNW has offered to meet with its unions to discuss this offer and related issues. According to Petitioner, the unions believe that such discussions must proceed under the auspices of the Railway Labor Act (RLA).[20] Bargaining under the RLA requires maintenance of the status quo, and permits resort to strikes, lockouts or other form of self-help if an impasse cannot be mediated. CNW takes the position that such bargaining gives labor the power to defeat the FRVR transaction, and is not required. However, informal discussions have taken place, but no agreements have been reached.

CNW has petitioned for a declaration as to the Commission's view of its role in resolving any labor disputes which may arise in connection with the implementation of this Commission authorized transaction.[21] CNW asserts such an action is required to ensure a smooth implementation of the authorized transaction.

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[19] Verified statement of Robert Schmiege.

[20] 45 U.S.C. 151.

[21] Pursuant to our class exemption rules, 49 CFR 1150.31 *et seq.*, the CNW/FRVR exemption became effective December 30, seven days after filing. Petitioners indicated that they intend to defer consummation until the Commission responds to their petition for clarification. A related petition for exemption of a control relationship between FRVR and its parent corporation has also been filed.

The Railway Labor Executives' Association (RLEA) has filed in opposition to the Petition of FRVR and CNW. RLEA believes that the Commission is without jurisdiction to issue the clarifying decision requested by Petitioners, and that Petitioners' argument on the merits is based on erroneous legal interpretations.

DISCUSSION AND CONCLUSIONS

The first of RLEA's propositions appears to be based on a misapprehension of the nature of a declaratory order. It seems beyond question that the Commission has the authority to issue declaratory opinions.[22] RLEA does not directly address this authority, arguing instead that the Interstate Commerce Act (ICA) does not vest this agency with the power "to decide the applicability and scope of other statutes"–that the "Commission is clearly not the tribunal to determine how to resolve conflicting mandates of the ICA and other statutes." That is true enough, if understood to mean that the Commission's opinions on statutory interpretation are, when challenged, subject to judicial review and possible override. There is no dispute over the fact of judicial primacy, but it does not follow that the Commission is foreclosed from expressing its viewpoint, or that such expressions may not issue in declaratory form, when related to the discharge of explicit statutory power, such as the power to approve or exempt the sale of a line of railroad. There is no need to deprive private parties and reviewing courts of the benefit of a clear statement of the Commission's viewpoint. The reason for declaratory opinions is to aid in clarifying and resolving controversies.

[22] Pursuant to 5 U.S.C. 554(e), an administrative agency is empowered in its discretion to issue declaratory orders to terminate controversy or remove uncertainty.

A part of the present controversy that requires clarification is whether the Railway Labor Act must be accommodated (in RLEA's words, subordinated) to the Interstate Commerce Act in the circumstances of an approved or exempted line sale arising under section 10901 of the ICA. A related issue is the immunity from injunction under the Norris-LaGuardia Act of a strike that threatens to prevent the consummation of a transaction so approved or exempted.

Until quite recently, it had been an established rule that the orders of the Commission approving the merger, sale, or abandonment of a line of railroad were not subject to collateral attacks in the courts, and could not be frustrated by employee actions taken under the aegis of the Railway Labor Act or otherwise.[23] "Congress did not intend employees have such power to block consolidations which are in the public interest." [24] However, in a recent Third Circuit proceeding, *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Association.*[25] (*Lake Erie*), it has been held that a district court has no jurisdiction to enjoin a strike taken to block an ICC-approved sale. The Court based this holding on a finding that the Norris-LaGuardia Act need not be accommodated to the Interstate Commerce Act. This decision has had an immediate impact on the formation of small railroads,[26] threatening to halt the

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[23] *Brotherhood of Locomotive Engineers* v. *C&NW*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

[24] *Missouri Pacific Railroad Company* v. *UTU*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987).

[25] No. 87-3664, Slip op., October 26, 1987.

[26] The *Lake Erie* decision has been followed by a Missouri federal district court, *Burlington Northern Railroad* v. *U.T.U.*, No. 86-5013, Slip op., October 26, 1987. (Missouri, Western District).

revitalization of the marginal railroad sectors – a restructuring that the Commission has found to be in the interest of carriers, labor, and the shipping public.

In its opposition response, RLEA takes the position that the Third Circuit *Lake Erie* decision is correct,[27] and that the Commission should conclude that the Interstate Commerce Act does not supersede the Railway Labor Act or Norris-LaGuardia. RLEA argues that *Brotherhood of R.R. Trainmen* v. *Chicago River and Indiana R.R.*[28] (*Chicago River*) and *Boys Markets Inc.* v. *Retail Clerk's Union*[29] (*Boys Market*) – Supreme Court "accommodation" cases relied on by Petitioners – are not controlling since they do not address the Interstate Commerce Act, but are limited to situations where aspects of national labor statutes were in conflict.[30] Hence, RLEA is in agreement with the *Lake Erie* court that statutory preemption of the Norris-LaGuardia no-injunction principle is limited to the need to accommodate other *labor* statutes. Without conceding its legiti-

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[27] The *Lake Erie* decision left open the issue of whether bargaining under the Railway Labor Act was necessary. The case was remanded to the district court on the RLA issue. The district court held the RLA applicable to the proposed sale and enjoined consummation of the transaction pending compliance with that act, finding that the Interstate Commerce Act does not operate to relieve the parties from the RLA obligations. *Railway Labor Executives' Assoc.* v. *Pittsburgh & Lake Erie Railroad*, No. 87-1745 Memorandum Opinion (Wes Dis. PA., No. 24, 1987). The case is back in the Third Circuit on appeal.

[28] 353 U.S. 30 (1957).

[29] 398 U.S. 235 (1970).

[30] Thus, in *Chicago River* an injunction against a strike was sustained where necessary to protect the Railway Labor Act's requirement that "minor" grievances be submitted to arbitration. In *Boys Markets* the court reached a similar conclusion under the Labor Management Relations Act.

macy, RLEA recognizes certain precedent to the effect that ICC authorization of a transaction under the merger provisions (49 U.S.C. 11343) will automatically relieve a carrier from the necessity of compliance with the Railway Labor Act to the extent necessary to go forward with the approved transaction. However, RLEA argues that this precedent has no relevance to 49 U.S.C. 10901 line sales. Unlike line sales, merger orders are provided explicit preemption authority in 49 U.S.C. 11341[31] and, as income protection and dispute resolution mechanisms are mandatory in merger proceedings,[32] labor is not "left out in the cold." [33] According to RLEA these are critical distinctions.

The broad issue presented by the CNW-FRVR Petition and the RLEA Opposition reply is whether the Interstate Commerce Act preempts the Railway Labor Act to the extent necessary to allow the parties to consummate a transaction previously authorized by the Commission. Every court that had ruled on this precise issue prior to the *Lake Erie* decision had answered

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[31] A carrier or corporation participating in a transaction approved or exempted by the Commission under subchapter III of Chapter 113 "is exempt from the antitrust laws and from all other laws . . . as necessary to let that person carry out the transaction . . ." By its terms, this section does not apply to line sales under Chapter 109.

[32] 49 U.S.C. 11347.

[33] RLEA cites to language in *Missouri Pacific R. Co.* v. *United Transportation Union* 782 F.2d 109 (8th Cir. 1986). This case held that a railroad is exempted under ICA Section 11341(a) from the Railway Labor Act in connection with a transaction approved under 49 U.S.C. 11343. Labor emphasizes that the court there reasoned that inferring preemption is applied 782 F.2d, at 112. There are chronological problems with placing such reliance on the reasoning. The preemption provision was first enacted in 1920, mandatory labor protection in 1940.

yes.[34] By so doing, courts have recognized the importance of this agency's role in reconciling the conflicts between public need for an efficient transportation system, (including the need for fair and equitable labor relations) and the private disputes that arise invariably from consolidations and restructurings within the rail system. The ICC has inherent powers to impose labor protection where necessary to ensure labor equity,[35] including the power to impose income guarantees and comprehensive schemes for alternative dispute resolution – mechanisms which may include notice, negotiation, a status quo requirement and arbitration. From the 1930's, when the ICC actively became involved in the administration of labor protection. Congress has routinely affirmed and expanded the importance of the Interstate Commerce Act as a part of the complex of laws governing labor relations in the rail industry. The Transportation Act of 1940[36] was a legislative affirmation of the Commission's authority to impose labor protection, mandating the use of labor protection in mergers and consolidations.[37] The Railroad Revitaliza-

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[34] *See Missouri Pacific R. Co.* v. *United Transportation Union, supra; Brotherhood of Locomotive Engineers* v. *C&NW,* 314 F.2d 424 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963). *Cf. ICC* v. *Locomotive Engineers,* 55 USLW 4771 (June 9, 1987) (Concurring Opinion of Justice Stevens, joined by Justices Brennan, Marshall and Blackmun).

[35] *United States* v. *Lowden,* 308 U.S. 225 (1939); *ICC* v. *Railway Labor Assn.,* 315 U.S. 373 (1942).

[36] 54 Stat. 899.

[37] The *Lowden* court, while noting the pendency of the legislation which was to become the 1940 Act, concluded that the legislative initiatives did not militate against the conclusion that the Commission had implied power over labor protection in consolidations, but rather that Congress merely sought to make mandatory what was at the time discretionary. *United States* v. *Lowden, supra,* at 239.

tion and Regulatory Reform Act of 1976[38] mandated labor protection in trackage rights, lease transactions, and abandonments. The Staggers Rail Act of 1980 made labor protection mandatory in connection with the abolition of rate bureaus (Section 219 (g) and feeder line sales – section 401), as well as giving the Commission explicit discretion to impose protective conditions on reciprocal switching and on the construction of new rail lines. For more than fifty years the Commission has exercised its authority in this field, frequently at the request and with the support of labor, and our decisions have had enormous impact on the shape of rail labor relations throughout this period.

It is primarily due to the policy decision to withhold such protections taken in Ex Parte 392 (Sub-No. 1) (and in earlier individual proceedings) that the Commission's authority is under challenge. However, the Commission's policy determinations have been repeatedly sustained, and the existence of our jurisdiction may not hinge on the policy choice made.

In the first place, labor has not been left out in the cold. Affected parties were free to participate in the Ex Parte rulemaking, and are free to petition for its reopening. Indeed, aspects of the rulemaking are now under reconsideration in a reopened proceeding.[39] Further, in individual cases through the revocation process parties are given the opportunity to show that the policy norms of the Ex Parte rulemaking ought not apply. Full participation before the Commission is an important end in itself as it helps to inform the Commission of the

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[38] 90 Stat. 31.

[39] *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, Notice of Proposed Rulemaking served October 2, 1987.

range of problems and circumstances confronting transportation. If current policy does not provide routine protection, it is because experience has demonstrated that the formation of new lines would be thwarted, to the overall public detriment. Where exceptions are needed, the Commission has the authority to fashion a full remedy.

Jurisdiction is not determined by outcome. The Commission has exclusive and plenary jurisdiction over the sale, merger, or abandonment of rail lines.[40] This authority was granted by Congress as a part of a regulatory framework, to ensure a rail transportation system in the public interest. As a necessary component of this regulatory framework, the Commission has had to preempt on occasion the operation of other laws to the limited extent necessary to remove obstacles to Commission approved transactions. Such preemption of labor legislation has been upheld even in circumstances where the Commission did not provide labor protection under its auspices.[41] We believe this is the correct interpretation of the matter at issue.

The fact that a particular "labor outcome" does not dictate the extent or affect of ICC jurisdiction is a necessary correlative to the Commission's discharge of its responsibilities. That the concern for labor equity is only one of many conflicting aspects of National Transportation Policy should not be seen as a derogation of the agency's authority – rather it is precisely the reason why the Interstate Commerce Act must be recognized

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[40] *Brotherhood of Locomotive Engineers* v. *C&NW, supra*; *Chicago and North Western Transportation Co.* v. *Kalo Brick and Tile Co.*, 450 U.S. 311 (1981).

[41] *RLEA* v. *Staten Island Railroad Corp.*, 792 F.2d 7 (2d Cir. 1986) *cert denied* 107 S. Ct. 927 (1987).

to have preeminence. It is the public policy of this Nation to regulate and supervise transportation at the national level so as to ensure the essential benefits of a critical aspect of commerce. While the means of regulation have changed markedly over the decades, the exclusive and plenary nature of the Commission's jurisdiction over consolidations, sales and abandonment has been consistently upheld. In the discharge of our responsibilities, we are charged with the expert resolution of many-sided conflicts between disputants, public and private. The recitation above of the factors leading to our small-railroad policy illustrates the complexity of the process and information that led to our present policy.

As with all adversarial proceedings those which come before the Commission generate winners and losers, but it must also be clear that participants ought to, after exhausting lawful appeals aimed at our authority and reasonableness, be reconciled to the process. Allowing a dispersion of authority will compound the problems to the detriment of the public and the transportation system. In the matter at hand, it cannot be doubted that a strike to prevent ICC-approved abandonment is susceptible to injunction. But it is now contended that such a strike can be used to prevent the development of an advantageous alternative to abandonment, despite the fact that Commission jurisdiction over these two types of restructuring is, in all relevant aspects, identical. Our expertise and experience, combined with our system-wide responsibilities, lead us to the conclusion that neither the public nor labor is adequately protected by encouraging a system that prefers abandonment to rejuvenation. We do not believe the law is so structured as to compel that outcome.

Organized as it is, FRVR stands a far better chance of developing a self-sustaining rail operation than does CNW. Over the past quarter century the miles of road operated by CNW has decreased by a third.[43] Its management goals include further reduction in size, either through line sales or abandonment. Whether the lines at issue here could be abandoned immediately under existing law has not been demonstrated. However, fierce trucking competition combined with CNW's comparative disadvantage in rail costs significantly increases the potential of future abandonment. Clearly, the National Transportation Policy will be advanced by permitting the sale of these lines to a willing, experienced and optimistic group of managers, who will in turn rely on experienced labor and a commitment to the local customer base in an attempt to revive and preserve competitive rail transportation for this region of Wisconsin.

This action will not significantly affect either the human environment or energy conservation.

It is ordered:

The Petition of CNW and FRVR for an order clarifying jurisdiction and other matters is granted.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Lamboley and Simmons. Commissioners Lamboley and Simmons dissented with separate expressions.

Noreta R. McGee
Secretary

(SEAL)

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[42] *Moody's Transportation Manual* (1963 and 1987 issues) indicates that CNW operated over 15 thousand miles of road in 1962 (including miles operated under contract and trackage rights) but that total had declined to slightly over 10 thousand miles by 1986.

COMMISSIONER SIMMONS, dissenting:

I would have denied the petition for clarification. I have supported the policy expressed by the majority because I believe it has contributed, to some extent, to the preservation of rail lines that otherwise would have been abandoned. However, I do not agree with the majority's use of such glowing terms to describe the efficacy of the Commission's denial of labor protection in so-called "short" line sales under 49 U.S.C. 10901. The language of the decision strongly implies that there can be virtually no valid jurisdiction for departure from this policy. Indeed, the decision to grant the petition for clarification and enter this declaratory order to enunciate a policy that has long been settled and affirmed in the courts indicates a certain lack of objectivity and fairness in the application of that policy.

We must not lose sight of our responsibility to weigh the interests of labor as a part of the public interest considerations associated with section 10901 sales. Neither this responsiblity, nor the policy of which it is a part is enhanced by the gratuitous declaratory order entered here by the majority.

COMMISSIONER LAMBOLEY, dissenting:

While no one disputes the authority of the Commission to issue declaratory orders,[1] I believe to do so in this instance is an inappropriate use of process. In my view, there is insufficient evidence of controversy or uncertainty to warrant the issuance of this "clarifying" decision.

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[1] 5 U.S.C. 554(e).

In invoking the class exemption process under Ex Parte No. 392 (Sub-No. 1)[2] petitioners have also requested that the agency declare that its authority under 49 U.S.C. 10901 supersedes the provisions of the Railway Labor Act (RLA[3]) and the Norris LaGuardia Act.[4] They do so because of an alleged "climate of uncertainty" which it is claimed impedes consummation of the proposed transaction. Upon closer examination it becomes evident that the alleged controversy or uncertainty results from judicial decisions as well as petitioner's own conduct, neither of which the declaratory order requested from this agency will necessarily resolve. Indeed, this order may well exacerbate matters not only for this case but for constructive activities in this forum on such issues in the future.

Petitioners argue such action is necessary because several recent court decisions[5] "reflects a misapplication of the accommodation doctrine and a misunderstanding of this Commission's role in addressing labor issues pertianing to transactions within its jurisdiction." The petitioners do not agree with the outcome of judicial action in which they did not participate, although the Commission did. Without more, the petitioners simply request that the Commission here render

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[2] Ex Parte No. 392 (Sub-No. 1), *Class Exemption for Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985).

[3] 45 U.S.C. 151, *et seq.*

[4] 29 U.S.C. 101, *et seq.*

[5] *Railway Labor Executives' Association v. Pittsburgh & Lake Erie R. Co.*, __ F.2d __ (No. 87-3664, 3rd Cir. October 26, 1987) (*P&LE I*) and *Railway Labor Executives' Association v. Pittsburgh and Lake Erie R. Co.*, Civil Action No. 87-1745 (W. D. Pa. Nov. 1987), appeal pending *sub nom. Railway Labor Executives' Ass'n v. Lake Erie Co.*, No. 87-3797 (3rd Cir. filed Nov. 25, 1987) (*P&LE II*).

a "proper" interpretation of applicable law by declaratory order. Petitioners offer neither substantial reason nor purpose for their request as it may relate to judicial activity.

Additionally, the petitioners claim the Commission's declaratory order is necessary because, while the CNW has met with the rail unions and informal discussions have taken place, no agreements have been reached since the unions believe (apparently contrary to petitioners) that RLA procedures apply to such discussions. The petitioners do not explain why they simply do not file a request with the Commission to fashion and impose appropriate protective conditions, with post consummation negotiation and arbitration procedures, if need be. Such request for relief would squarely address alleged controversy or uncertainty concerns relating to the process and substance of negotiation.

In sum, neither judicial action nor voluntary conduct is sufficient premise upon which to establish controversy or uncertainty as cause for declaratory relief in this case.

Further, quite apart from the lack of any legitimate, demonstrable need for declaratory relief, I fail to see that this order makes any significant contribution toward resolution of statutory "accommodation" issues. There is little doubt that the Commission does not have the requisite *jurisdiction* to interpret the applicability and scope of statutes other than the ICA. Certainly the agency may "express its viewpoint". Such as it is. It is a position which has been expressed repeatedly in court briefs[6] submitted by the Commission, and is well known. This decision appears to be little more than an attempt

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[6] See for example the Commission's brief in *P&LE II*, also a letter to District Judge dated October 8, 1987.

to supplement arguments in briefs previously filed and bolster prior discussion in Ex Parte No. 392 (Sub-No. 1).[7] It is self-serving and offers no new instruction.

Moreover, of particular concern here, is the eagerness to justify a well known position, the effect of which places the Commission in the position of apparent bias. This is especially true here because, in addition to the extended discussion of the Ex Parte No. 392 (Sub-No. 1) and pre-emption matters, this decision addresses specific employment security and displacement issues in this transaction, and consequently, in anticipatory fashion, effectively prejudices and precludes meaningful consideration of any subsequent petition for revocation raising protective condition issues. The lack of agency constraint here has unfortunate ramifications.

Finally, after all things are considered, it is fair to say that any instability or uncertainty over employment security and displacement issues is largely a consequence of our own doing by decisions such as this, as well as those in Ex Parte No. 392 (Sub-No. 1) and its progeny. Legitimate transportation transactions under the ICA have been authorized in an manner which encourages and permits unilateral abrogation of legitimate, collective bargaining agreements and statutory requirements of the RLA, without procedural or substantive accommodation of respective interests. Mutuality and reciprocity in collective bargaining contemplated by the RLA and resultant market-based arrangements have been nullified by our approach. It is small wonder then that the incentives for problem solving and dispute resolution through the negotiation proc-

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[7] Ex Parte No. 392 (Sub-No. 1), *Class Exemption for Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985).

ess have been diminished and relations have become unstable.

It has become abundantly clear in these cases that the essence of the dispute in labor relations issues, not transportation.[8] Assuming jurisdiction, the Commission's current fixed position prevents adjustment and resolution in this forum.

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[8] See, also letter dated December 2, 1987 in Finance Docket No. 31163, *Winoma Bridge Railroad Company Trackage Rights – Burlington Northern Railroad Company.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

UNITED TRANSPORTATION UNION,
BURLINGTON NORTHERN RAILROAD COMPANY,

and

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENT RAILWAY LABOR EXECUTIVES' ASSOCIATION IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Does the Interstate Commerce Commission, which was an intervenor in the appellate court in a case growing out of a labor dispute, have standing to file a petition for a writ of certiorari where it lacks a personal stake in the outcome of the controversy, where the underlying labor dispute has been resolved, and where the Solicitor General has authorized neither its intervention below nor its petition to this Court?

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Railway Labor Act, 45 U.S.C. § 151, *et seq.*	2, 5, 6, 14
28 U.S.C. § 516	11, 12
28 U.S.C. § 519	12
28 U.S.C. § 1254(1)	2, 9, 12
28 U.S.C. § 2323	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-711

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

UNITED TRANSPORTATION UNION,
BURLINGTON NORTHERN RAILROAD COMPANY,

and

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENT RAILWAY LABOR EXECUTIVES' ASSOCIATION IN OPPOSITION TO PETITION

On October 26, 1988, the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] filed a petition with this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the decision of that court in *Burlington Northern R.R. v. United Transportation Union*, 848 F.2d 856 (8th Cir. 1988). Respondent Railway Labor Executives' Association [hereinafter, "RLEA"] [1] respectfully submits

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[1] RLEA is an unincorporated association of the Chief Executive Officers of nineteen (19) labor organizations which collectively represent virtually all organized rail employees in this country. A list of RLEA's member organizations is attached hereto as Ap-

that the ICC's petition should be denied, for the ICC lacks standing to invoke this Court's jurisdiction and, even if that agency had standing, this case no longer presents a live case or controversy nor merits review by this Court at this time.

JURISDICTION

Respondent RLEA respectfully submits that this Court does not have jurisdiction under 28 U.S.C. § 1254(1) to grant the writ as requested by the ICC, for several reasons. First, the ICC's interest in this matter is not sufficient to give it standing to seek the writ from this Court. And second, this case no longer presents a live case or controversy as required by Article III of the Constitution of the United States.

COUNTERSTATEMENT OF THE CASE

As petitioner ICC noted in its petition, this case traces its origin to a decision by the Burlington Northern Railroad Company [hereinafter, "BN"] to lease and sell a portion of its rail operations and properties to a newly-formed railroad, Montana Rail Link, Inc. [hereinafter, "MRL"]. Shortly after that transfer of operations appeared imminent, respondent United Transportation Union [hereinafter, "UTU"], two other labor organizations and sixteen (16) individual employees filed a suit with the United States District Court for the District of Montana on July 30, 1987, against respondent BN to enjoin that transfer of rail operations. *UTU v. BN*, D. Mont. Civil Action No. CV-87-73-H-CCL. Several days after that suit was initiated, respondent RLEA filed a complaint with the United States District Court for the Western District of Missouri on August 6, 1987, against respondent BN to enforce the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, which RLEA maintained the BN was violating by transferring rail lines, including the

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pendix A. Two of those member organizations, the United Transportation Union and the Brotherhood of Locomotive Engineers, are not participating in this response.

MRL line, without first complying with the labor statute's notice, bargaining and status quo requirements. *RLEA v. BN*, W.D.Mo. Civil Action No. 87-0696-CV-W-8. Respondent BN counterclaimed against RLEA and its individual member unions which represented BN employees seeking to enjoin any strike over those sales. On September 18, 1987, that case was consolidated with an earlier action which respondent BN had brought against respondent UTU and another labor organization in 1986 to enjoin a strike over another sale of a BN rail line in 1986; *i.e.*, W.D.Mo. Civil Action No. 86-5013-CV-SW-8.

In October 1987, respondent UTU and the other plaintiffs in the Montana litigation asked that district court to enjoin the transfer of the BN's rail lines to MRL, but on October 29, 1987, the court denied rail labor's request. *UTU v. BN*, 672 F. Supp. 1579 (D.Mont. 1987), *appeal pending*, 9th Cir. No. 87-4386. Even though it concluded that it could not enjoin the transfer of the rail lines, the district court for the District of Montana observed that it might not have jurisdiction by virtue of Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, to enjoin a strike over that transfer of rail lines. 672 F. Supp. at 1582-83 n.3.

Once that decision was issued, respondent BN transferred its rail line to MRL, and the UTU responded by striking the BN. However, rather than asking the district court that had heard and denied the UTU's request concerning the transfer of the rail line, to enjoin a strike over that transfer, respondent BN asked the district court for the Western District of Missouri to prohibit the UTU, as well as all other labor organizations on the BN, from striking. That request was made on October 30, 1987 and was granted; on November 4, 1987, the court extended that Temporary Restraining Order until November 16, 1987. However, respondent BN's request for a preliminary injunction was denied on November 16, 1987, for the court concluded that Section 4 of the Norris-

LaGuardia Act withdrew its jurisdiction to enjoin the UTU's strike.

Respondent BN immediately noted an appeal from that order (subsequently docketed as 8th Cir. No. 87-2600) and sought an injunction from the district court to prohibit a strike pending appeal. That injunction request was granted by the district court; respondent UTU and "all persons acting in concert with" it were enjoined by that order from striking pending the BN's appeal. Respondent UTU on November 25, 1987, filed a notice of appeal from that interlocutory injunction order and that notice was docketed by the Eighth Circuit as 8th Cir. No. 86-2581; thereafter, the two appeals were consolidated. On December 15, 1987, respondent UTU's request for a stay of the injunction pending appeal was heard by a panel of the Eighth Circuit and, after oral argument, the appellate court directed that supplemental briefs be filed by December 29, 1987.

On December 29, 1987, petitioner ICC filed a motion with the Eighth Circuit to intervene in both appeals. According to the ICC, its intervention was proper "because the litigation presents a serious issue affecting the Commission's jurisdiction over transfers and sales of rail property within the nation's rail transportation system." ICC Motion To Intervene in support of BN, App. B at 3a (the ICC's motion to intervene is reproduced herein as Appendix B). Moreover, according to the ICC, its intervention was a matter of right in order "to protect its exclusive and plenary jurisdiction." App. B at 3a-4a. Petitioner ICC did not claim that its right to intervene was conferred by any specific statutory authority, nor did it assert that the Attorney General had authorized it to intervene through its own attorneys. That motion was granted on December 30, 1987.[2]

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[2] RLEA was not asked whether it would consent to the ICC's intervention before that motion was filed. RLEA, however, did not file an opposition to that motion to intervene, nor did it seek reconsideration of the intervention order.

No further arguments were heard by the Eighth Circuit, and on May 31, 1988, the panel which had heard oral argument on the UTU's motion to suspend the injunction pending appeal, entered its ruling on the merits of both appeals.[3] After noting the purposes of both the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, the court concluded that there was an overlap of the two statutes in the area of rail sales, for, according to the panel, the transportation Act was intended "to prevent labor strife by assuring 'fair wages and working conditions in the railroad industry.'" Pet. at 26a, quoting 49 U.S.C. § 10101a(12). "In these narrow circumstances," the panel stated, "the ICA supersedes the authority of the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping process designed to reach labor protective agreements." Pet. at 26a. Section 4 of the Norris-LaGuardia Act, a majority of the panel concluded, stood on a different footing and was not superseded by the transportation statute. As the majority explained (Pet. at 30a):

> In examining the impetus behind the recent deregulatory efforts in the railroad industry, Congress has sought to free the union-management relationship from time-consuming, "process oriented" bureaucracy imposed by various regulatory statutes and to allow the sagacious invisible hand of the free market economy to reorder rapidly that industry's economic difficulties. Thus, while we agree with BN's contention that enforcing the mandatory bargaining provisions of the RLA might render the changes in

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[3] RLEA filed an appearance as appellee in the BN's appeal from the denial of its motion for a preliminary injunction; RLEA did not file an appearance in the UTU's appeal from the injunction pending appeal because it viewed that injunction as being ancillary to the BN's appeal and not appealable in its own right. RLEA filed a brief as an appellee in the BN's appeal and a response to the request for rehearing.

> the ICA without much practical force, we find . . . no inherent incompatibility between these actions and Norris-LaGuardia.

The appellate court, with Circuit Judge Fagg dissenting, affirmed the district court's decision denying the BN's request for a preliminary injunction and dissolved the strike injunction pending appeal. Pet. at 31a-32a.

Respondent BN filed a petition for rehearing and a suggestion for rehearing *en banc*, but on September 16, 1988, the panel denied the rehearing request. Also, the suggestion for rehearing *en banc* was denied, for only four of the active Circuit Judges voted to hear the case *en banc*.[4] Pet. at 12a-13a.[5]

Once the court denied the BN's rehearing request, respondent BN sought to continue the strike injunction, first by asking the appellate court to stay the mandate and then, when that request was denied, by asking Justice Blackmun to recall the mandate. That request was denied by Justice Blackmun on October 4, 1988. Sup. Ct. No. A-258, *BN v. UTU*. Respondent BN then filed a motion with the district court for the Western District of Missouri on October 4, 1988, for a preliminary injunction to enjoin a strike by the UTU "and all persons, agents, representatives, organizations, and members acting directly or indirectly on their behalf . . . ." BN Motion, served October 4, 1988, at 2. Respondent BN maintained that the district court could enjoin a strike by the UTU, because the underlying dispute—*i.e.*, whether the BN could sell before it bargained—was a "minor dispute" under the Railway Labor Act. *See, Chicago &*

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[4] Judge Fagg was not one of the judges who voted for rehearing *en banc*.

[5] Even though the ICC filed a pleading styled a petition for rehearing, the Eighth Circuit's order and amended order denying rehearing did not reflect that the court considered the ICC to have made such a request. Pet. at 12a-13a.

North Western Transportation Co. v. RLEA, 855 F.2d 1277 (7th Cir. 1988), *pet. for cert. pending*, Sup. Ct. No. 88-464.

That motion was heard by the district court on October 4, 1988, but no decision was entered. Instead, the parties were directed to report to the court on October 11, 1988 concerning "the status of negotiations" between BN and UTU and whether a strike was imminent. Order of district court dated October 6, 1988 in W.D. Mo. Nos. 86-5013-CV-SW-8 and 87-0696-CV-W-8. On October 11, 1988, respondents BN and UTU informed the district court that they had "reached a tentative agreement" concerning the "effect on UTU employees" from the MRL transfer, and "if details can be finalized are hopeful that a final agreement can be reached soon." Joint Status Report filed October 11, 1988, at 2. Respondents BN and UTU stated further: "Because of the status of this matter, UTU will not authorize a strike." *Id.*

A subsequent status report was filed with the district court by the BN, UTU, RLEA and the Brotherhood of Locomotive Engineers on November 1, 1988. In that status report, the Court was informed that:

> Burlington Northern and United Transportation Union, who had arrived at an agreement in principle prior to the last oral status report, believe they have now arrived at an agreement upon all or most of the details of a compromise of their dispute relating to Montana Rail Link. The parties [*i.e.*, BN and UTU] are circulating a written proposal spelling out the details of their compromise agreement and hope to have same agreed upon in final form and fully executed by November 10, 1988.

Joint Status Report filed November 1, 1988 at 2. The parties further informed the court that: UTU "has agreed not to take any strike action prior to 00001 A.M. November 12, 1988, pending and in anticipation of the proposed voluntary compromise." *Id.*

Counsel for RLEA has been informed that the agreement has been reached and signed by both parties and that part of the final agreement requires both BN and UTU "to withdraw and dismiss with prejudice all claims, complaints, appeals, demands and lawsuits which in any way contest the legality, effect or impact of BN's sale and lease of trackage to MRL." Settlement Agreement and Release, signed November 3, 1988, at Art. VI.[6] In particular, the BN and UTU (*id.*):

> [W]ill withdraw and dismiss with prejudice any claims or causes of action concerning BN's sale and lease of trackage to MRL that are pending in *Railway Labor Executives' Association v. Burlington Northern Railroad Company v. RLEA, et al.*, No. 87-0696-CV-W-8 consolidated with No. 86-5013-CV-SW-8; [and] any further appeals from *Burlington Northern Railroad Company v. UTU*, Nos. 87-2581 WM and 87-2600 WM (8th Cir. 1988) . . . .

In the meantime, the ICC filed this petition with this Court. However, the Solicitor General has not authorized that agency to file this petition. *See*, Brief for United States as Amicus Curiae at 19 n.16 in Sup. Ct. Nos. 87-1589 and 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*.

SUMMARY OF ARGUMENTS

Petitioner ICC is an unauthorized interloper in the labor dispute which was before the Eighth Circuit. That dispute arose out of a controversy concerning a railroad's obligation to bargain with rail labor and involved the issue of whether Sections 4 and 8 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 108, withdrew jurisdiction from the federal courts to enjoin, at BN's request,

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[6] Counsel for RLEA has been informed that this agreement has been signed by both parties, but at present has been provided solely with a copy of the agreement signed by the UTU. Therefore, RLEA cannot state with absolute assurance that the agreement has been finalized. Counsel will continue to attempt to verify the status of the settlement and will inform the Clerk's office of any change.

a strike arising out of that controversey. Petitioner ICC is interested in that dispute solely because of its incidental effect on the BN's willingness to transfer rail lines which are the subjects of ICC orders, and thus, the Commission does not have a sufficient interest in this dispute to give it standing to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1). Moreover, the ICC lacks standing to invoke this Court's jurisdiction since the Solicitor General has not authorized the Commission to file this petition or to intervene below. But even if it were assumed *arguendo* that the ICC had standing below, the settlement of the controversy which had led to the UTU's strike means that this proceeding no longer presents a live case or controversy. And finally, the issue presented by this case does not warrant review by this Court at this time.

REASONS FOR DENYING THE WRIT

I. Petitioner ICC Lacks Standing To Ask This Court To Review The Eighth Circuit's Decision Since It Has Not Suffered A Legally Cognizable Injury As A Result Of The Lower Courts' Refusal To Issue A Strike Injunction

It is axiomatic that this Court does not have jurisdiction to issue advisory opinions, but rather, may act only in cases which present an actual "case or controversy." *E.g., Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). One aspect of this constitutional limitation on this Court's jurisdiction is the "constitutional dimension" of the standing requirement which requires the person invoking this Court's jurisdiction to show " 'such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." 422 U.S. at 498-99, *quoting Baker v. Carr*, 369 U.S. 186, 204 (1962) (emphasis in original). In this case, RLEA respectfully submits, the ICC lacks such a personal stake in this controversy as to warrant its invocation of this Court's jurisdiction. *Diamond v. Charles*, 476 U.S. 54 (1986).

Petitioner ICC informed the court of appeals that it needed to intervene because the issue involved in this case—*i.e.*, whether a federal court, notwithstanding the strictures of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, could enjoin a strike in a labor dispute arising from a refusal of a railroad to bargain over the impact on employees of a sale or other transfer of rail assets subject to the regulatory jurisdiction of the ICC—presented a "serious issue affecting the Commission's jurisdiction over transfers and sales of rail property within the nation's rail transportation system." App. B at 3a.

While the ICC may have been concerned about the impact which the issue presented to the appellate court might have on its ability to discharge its responsibilities, the actual case or controversy in which that issue arose did not involve the ICC directly, nor did it involve either a direct or even an arguable collateral attack on an ICC order. Here, the BN did transfer its rail properties to MRL and that transfer was completed before the litigation arrived in the appellate court. Thus, the strike cannot be viewed as threatening the consummation of the transfer exempted from regulation by the ICC exemption order. Moreover, since the ICC did not, and still does not, have the power to compel the BN to transfer its rail lines pursuant to an exemption (*accord*, *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298 (1954)), whether or not the UTU can use its non-judicial, economic powers to persuade the BN to reconsider the terms of, or even its decision to transfer its properties to MRL, cannot be viewed as a "collateral attack" on the ICC's exemption. Surely, therefore, the question of whether federal courts have jurisdiction to enjoin such a strike cannot be viewed as presenting a collateral attack on the ICC's exemption. In short, since no order of the ICC was attacked either directly or collaterally, the ICC lacked a personal stake in the outcome of this controversy of a degree which would give it standing to seek to enjoin the UTU's previously threatened strike.

Petitioner ICC cannot overcome its lack of standing by asserting that its status as an intervenor before the court of appeals allows this Court to dispense with the standing requirement, or stated another way, its role as an intervenor *a fortiori* satisfies the standing requirement. In *Diamond v. Charles*, *supra*, this Court addressed a comparable automatic standing assertion and stated: "Although intervenors are considered parties entitled, among other things, to seek review by this Court, . . . an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." 476 U.S. at 68. Here, the BN has not, and, this Court has been informed, will not file its own petition for a writ of certiorari in this case. *See*, Letter of Counsel for BN to this Court, dated November 8, 1988, in No. 88-711. Consequently, the ICC cannot rely upon the BN's standing to give this Court Article III jurisdiction. And since the ICC lacks constitutional standing on its own, its petition does not present a justiciable case or controversy.

II. Petitioner ICC Lacks Standing To Ask This Court To Review The Eighth Circuit's Decision Since The Solicitor General Has Not Authorized It To Intervene Below Or To File This Petition

In its petition, the ICC notes that its authority to intervene below and its status as a proper party before this Court may be raised as an issue in this case. Pet. at 10. That prediction is accurate, for RLEA is raising that question.

Respondent RLEA notes that the Solicitor General has informed this Court that he did not authorize the Commission to intervene before the Eighth Circuit or to file its petition with this Court. Brief for United States as Amicus Curiae in Nos. 88-1589 and 87-1888, *supra*, at 19 n.16. Consequently, the ICC does not have standing to invoke this Court's jurisdiction, for 28 U.S.C. § 516 gives the Attorney General the responsibility to conduct

"litigation in which the United States, [or] an agency . . . is a party, or is interested . . . ." 28 U.S.C. § 516. Moreover, 28 U.S.C. § 519 gives the Attorney General the authority to "supervise all litigation to which the United States, [or] an agency . . . is a party . . . ." 28 U.S.C. § 519.

Those general provisions apply and preclude unauthorized intervention or participation by the ICC unless that participation is "otherwise authorized by law." 28 U.S.C. §§ 516, 519. Here, however, the ICC's participation is not "otherwise authorized" by any statute, for the statutory provision upon which the ICC has primarily relied, 28 U.S.C. § 2323, at best authorizes the ICC to appear "in any action involving the validity of" an ICC order.[7] 28 U.S.C. § 2323. A suit to enjoin a strike does not involve the validity of an ICC exemption.

Since the Solicitor General has not authorized the ICC to participate before the Eighth Circuit or to file its petition in this proceeding, the Commission lacks standing to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

III. The Settlement Of The Strike Means That This Case No Longer Presents A Justiciable Issue

At present it appears that the UTU has reached an agreement with the BN over the specific transfer of BN rail lines which led to the strike that was the subject of the litigation in which the ICC intervened. That agreement means that there is no longer a strike threat in this case and, thus, this case no longer presents a live case or controversy. *E.g.*, *Weinstein v. Bradford*, 423 U.S. 147 (1975).

Petitioner cannot escape the mootness of this case by asserting that the situation presented here is "capable of

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[7] RLEA submits that § 2323 does not authorize ICC intervention in collateral attack cases. *See*, Brief for RLEA in Opposition To Petition in No. 88-217, *ICC v. Pittsburgh & Lake Erie R.R.*, at 6-7.

repetition, yet evading review," for the continued viability of *RLEA v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3rd Cir. 1987), *pet for cert. pending*, Sup. Ct. No. 87-1589, shows that the challenged action is not of such a limited duration that its validity cannot be "fully litigated prior to its cessation or expiration . . . ." *Weinstein v. Bradford*, *supra*, 423 U.S. at 149. As this Court stated in *Sosna v. Iowa*, 419 U.S. 393, 402 (1975):

> In cases in which the alleged harm would not dissipate during the normal time required for resolution of the controversy, the general principles of Art. III jurisdiction require that the plaintiff's personal stake in the litigation continue throughout the entirety of the litigation.

As shown above, the ICC never had a judicially cognizable personal stake in the outcome of this case. But even if it did, that personal stake surely ended when the UTU settled with the BN and no longer threatened to strike over the completed MRL transaction. Consequently, the Commission's exemption order cannot be said to be endangered and, therefore, its petition in this case presents only an academic issue.

IV. This Case Does Not Present An Issue Which Warrants Review By This Court At This Time

This case presents essentially the same issue as presented by No. 87-1589, *Pittsburgh & Lake Erie R.R. v. RLEA*, in which RLEA has filed a response acknowledging the importance of the issue, but asserting that the issue need not be reviewed by this Court at this time for several reasons. RLEA continues to maintain that its response to No. 87-1589 is correct, and that there is no need for this Court to review the specific accommodation question presented by both No. 87-1589 and this petition at this time.

First, there is no conflict among the circuits on the conclusion that an ICC exemption order under 49 U.S.C. § 10505 of a sale of a rail line which, but for that exemp-

tion, would have been subject to regulation by the ICC under 49 U.S.C. § 10901, does not restore to the federal courts the equity jurisdiction which Section 4 of the Norris-LaGuardia Act has withdrawn. Moreover, the lower courts' conclusion on this point is entirely consistent with the anti-injunction Act, its legislative history, and prior decisions by this Court such as *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960). And finally, the need to strike occurs in these line sale cases only because the carriers refuse to bargain and to maintain the status quo during that bargaining process. If this Court concludes that the Railway Labor Act requires a carrier both to bargain and to maintain the status quo, then there will be no need to address the Norris-LaGuardia Act issue because there should be no strikes. However, unlike No. 87-1589, in which RLEA suggested that the Court withhold acting on that petition until the underlying conflict of laws issue was resolved, RLEA submits that there is no need to defer action on this petition because of the standing and mootness problems.

CONCLUSION

For the reasons set forth herein, respondent RLEA respectfully submits that this Court should deny the ICC's petition.

Respectfully submitted,

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Attorneys for Respondent Railway Labor Executives' Association

Date: November 9, 1988

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APPENDICES

APPENDIX A

Railway Labor Executives' Association
Member Organizations

American Railway & Airway Supervisors Association (Division of TCU);

American Train Dispatchers Association;

Brotherhood of Locomotive Engineers;

Brotherhood of Maintenance of Way Employes;

Brotherhood of Railroad Signalmen;

Brotherhood Railway Carmen (Division of TCU);

Hotel Employees and Restaurant Employees International Union;

International Association of Machinists and Aerospace Workers;

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers;

International Brotherhood of Electrical Workers;

International Brotherhood of Firemen & Oilers;

International Longshoremen's Association;

National Marine Engineers' Beneficial Association;

Railroad Yardmasters of America (Division of UTU);

Seafarers International Union of North America;

Sheet Metal Workers' International Association;

Transport Workers Union of America;

Transportation•Communications Union (TCU); and

United Transportation Union.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2600WM

BURLINGTON NORTHERN RAILROAD CO.
Appellant

v.

UNITED TRANSPORTATION UNION
Appellee

No. 87-2581WM

UNITED TRANSPORTATION UNION
Appellant

v.

BURLINGTON NORTHERN RAILROAD CO.
Appellee

[Filed December 29, 1987]

[Granted, December 30, 1987]

MOTION OF THE INTERSTATE COMMERCE COMMISSION TO INTERVENE IN SUPPORT OF THE APPELLANT IN NO. 87-2600WN AND APPELLEE IN NO. 8-2581WM

These appeals raise the issue of whether the Norris La Guardia Act, 29 U.S.C. § 101 *et. seq.* (NLGA) withdraws jurisdiction from the courts to enjoin a strike designed to block the consummation of a transfer of rail properties previously authorized by the Interstate Commerce Commission (Commission) pursuant to the Interstate Commerce Act. 49 U.S.C. § 10101 *et. seq.* (ICA). The United Transportation Union (UTU) appellant in Docket No. 87-2581WM seeks to reverse a district court order granting an injunction pending appeal. BN, appellant in Docket No. 87-2600WM, seeks an order reversing the district court's order denying BN's request for a preliminary injunction against a threatened strike of BN by UTU.

The Interstate Commerce Commission, by and through its undersigned attorneys, hereby moves to intervene in support of the appellant in No. 87-2600WM and appellee in No. 87-2581WM pursuant to rule 27 Federal Rules of Appellate Procedures. The Commission should be authorized to intervene because the litigation presents a serious issue affecting the Commission's jurisdiction over transfers and sales of rail property within the nation's rail transportation system. Any resolution that holds the NLGA superior to the ICA impinges on the Commission's ability to administer the Act and denies to the Commission the exclusive and plenary jurisdiction over all aspects of the sale or transfer of rail properties confirmed upon it by Congress. The exclusive and plenary nature of the Commission's authority has been held to override the provisions of the NLGA to the extent necessary to carry into effect the order of the Commission permitting the transaction. *Missouri Pacific R.R. Co. v. UTU*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 3209 (1987). See also *BLE v. Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir.) *cert. denied*, 375 U.S. 819 (1963).

The Commission must be allowed to intervene as a matter of right to protect its exclusive and plenary juris-

diction. *Cf. Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, (D.C. Cir. 1984). Rule 24(a)(2) Federal Rule of Civil Procedure, the basic standard for granting intervention, permits intervention of right "when the applicant claims an interest relating to the . . . transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." *Liddel v. Caldwell*, 546 F.2d 768, 700 (8th Cir. 1976) *cert. denied sub nom. St. Louis Board of Education v. Caldwell*, 433 U.S. 14, (1977). The UTU's position strikes at the heart of the ICC authority over the sale of rail lines in this country—authority given to the Commission by Congress as an aid to the Commission's implementation of the National Transportation Policy and the ICC's operating statutes.

Only full intervention will permit the Commission adequately to protect its interests in these proceedings. Further, the rule governing intervention is to be liberally construed. Any doubt should be resolved in favor of allowing intervention. *Arkansas Electric Energy Consummers v. Middle South Energy Co.*, 772 F.2d 401 (8th Cir. 1985). See *Trbovich v. United Marine Workers of America*, 404 U.S. 528, 538 fn.10 (1971) where the court announced that the rule is satisfied if the applicant shows that representation of his interest may be inadequate; and the burden of making that showing should be treated as minimal.

The Commission's interests in this litigation differ from those of the private parties. The Commission claims exclusive and plenary jurisdiction over the transaction at issue here. The ICC has a legitimate interest in protecting its claim which entitles the agency to intervention, *Newport News Shipbuilding & Drydock Co. v. Peninsula Shipbuilders*, 646 F.2d 117, 121 (4th Cir.

1981). In any event, the Commission is the only person before the court charged with protecting the public in connection with authorizing the transaction out of which the instant litigation arose. Finally, only full intervenor status will afford the Commission the right to appeal any adverse decision by this court.

CONCLUSION

For the foregoing reasons, the motion of the Interstate Commerce Commission to intervene should be granted.

Respectfully submitted,

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General Counsel

HENRI F. RUSH
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[Certificate of Service Omitted in Printing]

Nos. 87-1589, 87-1888, 88-217 and 88-711

(3)

In the Supreme Court of the United States

OCTOBER TERM, 1988

SUPREME COURT, U.S.
FILED
NOV 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, AND THE INTERSTATE COMMERCE COMMISSION, RESPONDENTS

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY AND THE RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

THE UNITED TRANSPORTATION UNION, THE BURLINGTON NORTHERN RAILROAD COMPANY, AND THE RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD AND EIGHTH CIRCUITS

MEMORANDUM OF THE INTERSTATE COMMERCE COMMISSION

ROBERT S. BURK
General Counsel
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In the Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-1589, 87-1888, 88-217 and 88-711

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, AND THE INTERSTATE COMMERCE COMMISSION, RESPONDENTS

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY AND THE RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

THE UNITED TRANSPORTATION UNION, THE BURLINGTON NORTHERN RAILROAD COMPANY, AND THE RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD AND EIGHTH CIRCUITS

MEMORANDUM OF THE INTERSTATE COMMERCE COMMISSION

This memorandum responds to the amicus brief on the merits filed by the Solicitor General on November 7, 1988, in Nos. 87-1589 and 87-1888. It also responds to

the suggestion filed by Railway Labor Executives' Association (RLEA) (letter to the Court dated November 2, 1988) that the controversy out of which the Commission's petition in No. 88-711 arises may become moot, by virtue of Burlington Northern Railroad's (BN) management having capitulated to the demands of its employees for conditions upon its proposed sale of a rail line to Montana Rail Link (MRL) as the only means remaining which would permit carrying into effect the Commission authorized transaction.

1. We are pleased that the Solicitor General has added his voice to those of all others associated with this country's rail industry in urging this Court to decide the issues of the relationship of the Interstate Commerce Act, 49 U.S.C. 10101 et seq., (ICA) and Commission orders authorizing transactions thereunder to (1) the duty to negotiate under the Railway Labor Act, 45 U.S.C. 151 et seq. (RLA), and (2) the ability of courts to enjoin strikes which threaten to negate or unilaterally modify the terms of Commission authorized transactions. Since the *P&LE I* and *P&LE II* decisions of the Third Circuit below, the Commission's program to foster the formation of shortline and regional railroads, which the court below itself recognized was consistent with the will of Congress and in the public interest has come to a virtual standstill.[1]

Concomitantly, during the same period, abandonment applications have increased for the first year since the program has been in effect. Plainly such a result serves

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[1] As the Commission has noted in prior submissions to the Court in these proceedings the number of new railroad formations since the Third Circuit's decisions has fallen by 50%. Moreover, the rail track mileage encompassed in 49 U.S.C. 10901 *Class Exemption* filings has fallen by 85%.

no one's interest. The sooner this Court can act to straighten out the morass created by the decisions below the better for all concerned.

2. We are somewhat surprised that the Solicitor General continues to insist, however, in deciding these issues of seminal importance to the industry and to the Commission's performance of its approval and oversight functions, that the Commission's petition should not be heard by the Court. The court below granted the Commission amicus and subsequently full intervenor status in recognition of the importance of ascertaining the Commission's views. Moreover, the quotation from the court below chosen by the Solicitor General to support his position (with which we agree) that the *P&LE* cases are not moot (Brief of the United States, pp. 9-10, fn.8) presupposes that the Commission is a proper party to these proceedings whose views, among others, ought to be taken into account.

3. It is the Commission's position that 88-711 is not made moot by virtue of the settlement between BN and UTU. That settlement, far from mooting the Commission's petition in No. 88-711, underscores the urgency of this Court resolving the issues presented. By holding itself unable to enjoin a strike, the majority of the panel below has given to rail labor the power to dictate the terms upon which transactions authorized by the Commission as in the public interest will go forward – if at all. See, e.g., *P&LE* v. *RLEA*, No. 87-1888, where the transaction authorized by the Commission has been effectively negated. This situation represents a continuing affront to, and usurpation of, the exclusive authority vested in the Commission by Congress to approve transactions relating to consolidations, sales and other dispositions of rail assets in the rail industry. This in and of

itself would permit the Court to conclude that the controversy is a continuing one and not mooted by settlement.

Furthermore, as the Commission stated in its reply to the opposition in No. 88-217, the controversy arising out of the Commission's claim that the ICA must preempt other laws which act as obstacles to transfers under 49 U.S.C. 10901 is "capable of repetition yet evading review" *Southern Pacific Terminal Co.* v. *ICC,* 219 U.S. 498 (1911). Clearly, until this Court resolves these issues the orders of the Commission will continue to be subject to this challenge. *Weinstein* v. *Bradford,* 423 U.S. 147, 149 (1975), quoting *Sosna* v. *Iowa,* 419 U.S. 393 (1975).

4. However, because of the possibility of settlement in *BN* v. *UTU,* 848 F.2d 856 (8th Cir. 1988) in which RLEA represents that all parties other than the Commission will agree not to file for review by this Court, and because of the urgency of the situation in the industry, and because all relevant parties appear to be ready to move forward on the *P&LE* petitions, the Commission now agrees that the *P&LE* petitions represent the best vehicle for the resolution of the critical issues of the relationship of the ICA, RLA and the Norris-LaGuardia Act, 29 U.S.C. 101 et seq. (NLGA) presented in the Commission's petitions in Nos. 88-217 and 88-711.

CONCLUSION

For the reasons set forth herein, petitions for writs of certiorari to the United States Court of Appeals for the Third Circuit filed by the Pittsburgh and Lake Erie Railroad Company in Nos. 87-1589 and 87-1888 and by the Commission in No. 88-217 should be granted, and the cases should be consolidated and set for briefing and argument as expeditiously as possible.

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